Supreme Court of the United States

OCTOBER TERM, 1957

No. 79

UNITED STATES OF AMERICA, PETITIONER

vs.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

TRANSCRIPT OF RECORD

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UNITED STATES OF AMERICA, PETITIONER

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THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1957
CERTIORARI GRANTED MARCH 25, 1957

[fol. 1]

APPENDIX TO BRIEF FOR APPELLANT

CIVIL NO. 14715

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

THE F. & M. SCHAEFER BREWING CO.,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

DOCKET ENTRIES

1954	
August 31	Complaint filed. Summons issued.
September 1	Summons returned and filed. Defendant served.
November 1	Answer filed.
December 29	Notice of Motion filed for summary judgment.
1955	
January 12	Abruzzo, *J.* Motion for summary judgment adj. to 2-9-55.
February 9	Rayfiel, *J.* Motion for summary judgment adj. to 2-23-55.
February 23	Rayfiel, *J.* Hearing on motion for summary judgment. Motion argued and submitted. Decision reserved. All papers in by 3-5-55.

[fol. 2]

1955

April 14	Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.
May 24	Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.
July 21	Notice of Appeal filed.
August 23	Record on Appeal certified.
"	Record on Appeal with three copies of Index mailed to Clerk of Court of Appeals.
August 26	Receipt from Court of Appeals filed re Record on Appeal.

* * * *

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM DECISION—Filed April 14, 1955

Appearances: White & Case, Esqs., Attorneys for Plaintiff By E. W. Pabenstedt, Esq., for the motion Leonard P. Moore, Esq., U. S. Attorney for Defendant, by Elliot Kahaner, Esq., in opposition

RAYFIEL, *J.*

The plaintiff herein moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The parties agree as to the facts, which are as follows: the plaintiff, a New York corporation, had an authorized capital of 200,000 shares of $12 non-cumulative second preferred stock, without par value, having a stated value of $36.25 per share, and 6500 shares of common stock, the par value of which was $100 per share. Prior to March 21, 1951, there were, issued and outstanding, 100,000 shares

of the $12 non-cumulative second preferred stock and 1000 shares of the common stock. 100,000 shares of the said preferred stock and 1000 shares of the common stock were held as Treasury stock, and 4500 shares of the common stock were still unissued. The plaintiff's capital was $3,725,000.

On March 21, 1951, pursuant to appropriate action of its Board of Directors, the plaintiff increased the amount of its capital from $3,725,000 to $10,100,000. This was done by transferring the sum of $6,375,000 from its earned surplus account to its capital account. This bookkeeping entry increased the capital represented by each of the issued and outstanding 100,000 shares of no par value second preferred stock from $36.25 to $100 per share. No [fol. 17] additional shares were issued. At the same time the 100,000 shares of the preferred stock and the 1000 shares of common stock held by the corporation as Treasury stock were retired and cancelled.

The plaintiff did not affix any Federal documentary stamps to its stock books or other records. Subsequently, and after an examination of the corporation's books and records by agents of the Internal Revenue Service, a tax of $7012.50, together with interest in the amount of $177.07, was assessed against the corporation, pursuant to section 1802(a) of the Internal Revenue Code of 1939. The corporation paid the assessment, together with interest, and now sues to recover it on the ground that it was erroneously and illegally assessed and collected.

The facts in the case at bar are almost identical with those in the case of *U.S.* v. *National Sugar Refining Co.* 113 Fed. Supp 157, decided by Judge Leibell on April 30, 1953. He held that "Section 1802(a) is a tax on an original issue of capital stock. *It is not a tax on an addition to capital, made by a transfer from surplus to capital, where no new stock is issued.* The cases show that the stamp tax is, as L. Hand, *C. J.*, put it, 'an excise upon the act of issuance', to be imposed only once when the original certificate is issued. *Empire Trust Co.* v. *Hoey*, 2 Cir., 103 F. 2d 430 at page 432." (emphasis added). After an analysis of the pertinent regulations of the Internal Revenue Bureau (113.20, T. 26, Parts 80 to 169, C. F. R. 1949 edition) Judge Leibell stated, at

page 161, "The constant repetition of the words 'issue' and 'issued' in these Regulations emphasizes the point that it is when shares or certificates are issued that the stamp tax impinges on the transaction. An increase in the capital of a corporation by the transfer of part of [fol. 18] its earned surplus to the capital account for its outstanding shares of no par value stock does not require the corporation to pay a stamp tax under section 1802(a), if no shares or certificates are issued as part of the transaction. But if shares or certificates are subsequently issued against the increase in capital thus created, a stamp tax under section 1802(a) would, I believe, become payable. *Unless there are both the addition to capital and the issuance of new shares or certificates under the recapitalization, no stamp tax is payable under section 1802(a) as amended August 8, 1947.*

If the Congress had intended that a tax should be imposed on an increase of capital resulting from a transfer of earned surplus to capital it would have said so. If this fact situation constitutes an unforeseen 'loophole' in the tax structure, in particular section 1802(2) of the Internal Revenue Act, the Congress can take care of that also." (emphasis added).

I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted.

LEO F. RAFIEL,
United States District Judge

[fol. 19]

IN UNITED STATES DISTRICT COURT

JUDGMENT—May 24, 1955

The plaintiff having moved for summary judgment under Rule 56 R. C. P. and said motion having come on to be heard on February 23, 1955, and the parties having appeared and having presented their papers and arguments and after due consideration the plaintiff's motion for summary judgment having been granted on April 14, 1955, and the Court's opinion having been duly filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor.

APPROVED

Dated: Brooklyn, New York,
May 24th, 1955.

LEO F. RAYFIEL
U. S. D. J.

Judgment Rendered:

Dated: May 24th, 1955.
PERCY G. B. GILKES
Clerk

By: SIDNEY R. FEUER
Deputy Clerk

[fol. 20]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 21, 1955

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of United States District Judge Leo F. Rayfiel, entered in this action on May 25th, 1955, and froc each and every part thereof.

LEONARD P. MOORE
United States Attorney,
Eastern District of New York,
Attorney for Defendant,
271 Washington Street,
Brooklyn, New York.

By:
ELLIOTT KAHANER
Assisstant United States Attorney.

To:

PERCY G. B. GILKES,
CLERK, United States District Court,
Eastern District of New York,
271 Washington Street,
Brooklyn, New York

WHITE & CASE, Esquires,
Attorneys for Plaintiff,
14 Wall Street,
New York, New York.

[fol. 21]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(Title Omitted)

NOTICE OF MOTION FOR DISMISSAL OF APPEAL—
Filed September 12, 1956

SIRS:

PLEASE TAKE NOTICE that, upon the memorandum decision (judgment) of the United States District Court for the Eastern District of New York filed on April 14, 1955, the notice of appeal filed on July 21, 1955, the annexed affidavit of Thomas C. Burke sworn to the 18th day of January, 1956, and all other papers on file herein, the undersigned will move this court at Room 1705, United States Court House, Foley Square, New York, New York, on January 20, 1956, at 10:30 o'clock A.M., or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled appeal on the ground that appellant's notice of appeal was not timely filed pursuant to Rule 73(a), Federal Rules of Civil Procedure, and for such other and further relief as the court may deem just and proper.

Dated: New York, New York
January 18, 1956

Yours, etc.
WHITE & CASE
By /s/ Walter S. Orr
A Member of said firm,
Attorneys for
Plaintiff-Appellee,
14 Wall Street,
New York 5, N. Y.

To:

LEONARD P. MOORE, ESQ.,
United States Attorney,
Attorney for Defendant-Appellant
United States Post Office and
Court House Building,
Washington and Johnson Streets,
Brooklyn, New York

* * * *

[fol. 22]

AFFIDAVIT—To Notice of Motion, Etc.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS C. BURKE, being duly sworn, deposes and says:

1. I am associated with the law firm of White & Case, attorneys for the Plaintiff-Appellee in the above-entitled action, and am familiar with the facts pertinent thereto.

2. This action, which is for refund of $7,189.57 stamp taxes, was commenced on August 31, 1954 by the filing of a complaint with the United States District Court for the Eastern District of New York. Defendant's answer was filed on November 1, 1954.

3. On December 29, 1954, plaintiff filed a notice of motion for summary judgment for the taxes in suit. Said motion came on for a hearing before the Honorable Leo F. Rayfiel on February 23, 1955.

4. On April 14, 1955, a memorandum decision (judgment) of the United States District Court for the Eastern District of New York (Rayfiel, J.) was filed, granting plaintiff summary judgment for the taxes in suit.

5. A formal judgment was filed on May 24, 1955.

[fol. 23] 6. Defendant did not file a notice of appeal until July 21, 1955, on which date a notice of appeal was filed by the defendant "from the order of United States District Judge Leo F. Rayfiel, entered in this action on May 24th 1955" (the formal judgment entered herein). Said notice of appeal was filed more than sixty days after the aforesaid memorandum decision (judgment) was filed.

WHEREFORE plaintiff prays that the appeal herein be dismissed on the ground that appellant's notice of appeal was not timely filed pursuant to Rule 73(a), Federal Rules of Civil Procedure.

/s/ THOMAS C. BURKE

Sworn to before me this
18th day of January, 1956

/s/ ROBERT A. PERKINS

Notary Public, State of New York
No. 41-8327500
Commission Expires March 30, 1956

[fol. 23a] (File Endorsement Omitted)

[fol. 24]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 152—October Term, 1955.

Argued January 20, 1956
Docket No. 23775

THE F. & M. SCHAEFER BREWING CO.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Before:

CLARK, *Chief Judge*,
and
FRANK, MEDINA, HINCKS, LUMBARD, and WATERMAN,
Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge*.

The United States of America appeals from a summary judgment, D. C. E. D. N. Y., 130 F. Supp. 322, for the refund of stamp taxes paid it by The F. & M. Schaefer Brewing Co., and the latter moves to dismiss the appeal as not timely brought. Motion granted; appeal dismissed.

[fol. 25] THOMAS C. BURKE, New York City (White & Case, Walter S. Orr, and Edmund W. Pavenstedt, New York City, on the brief), *for plaintiff-appellee*.

KARL SCHMEIDLER, Atty., Dept. of Justice, Washington, D. C. (H. Brian Holland, Asst. Atty. Gen., and Ellis N. Slack, Atty., Dept. of Justice, Washington, D. C., and Leonard P. Moore, U. S. Atty., and Elliott Kahaner, Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y., on the brief), *for defendant-appellant*.

OPINION—September 12, 1956

CLARK, *Chief Judge*:

The plaintiff sued to recover the amount of stamp taxes which it alleged the government had illegally assessed and collected from it. The transaction which the government claimed to be thus subject to the tax in question did not involve the issue of any new stock certificates, but was actually an increase in the corporation's capital account by the transfer of $6,375,000 from its earned surplus account to its capital account, thus increasing the capital from $3,725,000 to $10,100,000, and the value of certain issued no-par-value stock from $36.25 to $100 per

share. In a reasoned opinion, D. C. E. D. N. Y., 130 F. Supp. 322, Judge Rayfiel granted the plaintiff's motion for summary judgment for the refund, quoting and relying upon the detailed exposition in *United States* v. *National Sugar Refining Co.*, D. C. S. D. N. Y., 113 F. Supp. 157, where Judge Leibell held that stamp taxes are required only on the issuance of capital stock, and not on a bookmaking transfer assigning greater capital assets to already issued stock. But we do not reach the merits, since we dispose of the appeal on a motion made by ap-[fol. 26]pellee to dismiss it on the ground that it was not timely taken. Originally the issues were argued before a panel of this court consisting of Judges Medina, Hincks, and Waterman; but since the motion presented an important question of practice and procedure going beyond the fortunes of this particular case, we determined that adjudication should be made by the full personnel of active circuit judges.

The facts on which disposition of this issue turns are as follows: By its complaint filed August 31, 1954, the plaintiff-appellee alleged payment on February 19, 1954, of documentary stamp taxes in the amount of $7,189.57 and demanded "judgment against defendant in the sum of $7,189.57, interest and costs." The alleged payment was admitted in the defendant's answer. On December 29, 1954, the plaintiff moved for summary judgment upon three affidavits showing in detail the tax payment of $7,189.57, and the grounds upon which it had been compelled, and also that no refund or credit had been made thereon. On April 14, 1955, Judge Rayfiel signed the memorandum decision directed to said motion, which is reported in 130 F. Supp. 322-324 and which concludes: "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." Thereupon the clerk made a docket entry as follows: "April 14 Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file." On May 24, 1955, the judge signed a formal "Judgment," as submitted by the plaintiff, for the recovery from the defendant of "the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum

of $37, aggregating the sum of $7,769.37." This document was stamped: "Judgment Rendered: Dated: May 24th, 1955. Percy G. B. Gilkes Clerk." Thereupon an entry was made in the clerk's docket as follows: "May 24 Rayfiel, J. Judgment filed and docketed against defend-
[fol. 27] ant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment."

The defendant filed its notice of appeal on July 21, 1955, or 96 days from the original grant of summary judgment and 58 days from the filing of the formalized judgment signed by the judge. Under F. R. C. P., rule 73(a) the United States has 60 days from "the entry of the judgment appealed from" in which to appeal, with a possible additional 30 days where granted by the district court upon a showing of excusable neglect in failing to learn of the entry. In our view the entry of judgment was on April 14, and the appeal is too late.

The goverminng principle is found in F. R. 58, which states as to non-jury cases: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs." In addition, F. R. 79(a) requires the clerk to keep a book known as a "civil docket," in which each civil action shall be entered with its file number and where "All papers filed with the clerk * * *, all appearances, orders, verdicts, and judgments shall be noted chronologically" on the folio assigned to the action. The rule continues: "These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation or an order or judgment shall show the date the nototion is made."

[fol. 28] The rules also make provision for formal judgments, F. R. 79(b), their form, F. R. 54(a),[1] and suitable indices thereto by the clerk, F. R. 79(c).

As we have held, these rules contemplate some decisive and complete act of adjudication by the district judge; when this is done, and notation thereof made in the civil docket, the judgment is complete without other formal documents which, if filed, are ineffective to delay the judgment or extend the time of appeal. See, e.g., *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, the notation of a grant of summary judgment, as here; and see also *Leonard* v. *Prince Line*, 2 Cir., 157 F. 2d 987, 989; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481, 485; *Binder* v. *Commercial Travelers Mut. Acc. Ass'n of America*, 2 Cir., 165 F. 2d 896, 901; *Markert* v. *Swift & Co.*, 2 Cir., 173 F. 2d 517, 519, n. 1; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, 2 Cir., 223 F. 2d 28; *In re Nuese's Estate*, 15 N. J. 149, 152, 104 A. 2d 281, 282. The history of F. R. 58 and its amendments, designed to strengthen it, as stated in the footnote,[2] [fol. 29] demonstrate that this was the intent of the rule. Its purpose is also advanced—as we pointed out in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 469—by Rule 10(a)

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[1] Compare forms of judgments, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Forms 30 and 31, pp. 68-70.

[2] In the successive Notes to F. R. 58 appearing in the Preliminary Draft, May 1944, the Second Preliminary Draft, May 1945, and the Report of Proposed Amendments, June 1946, at page 76, there is a statement of the reasons for the changes made—including the express mandate that the "entry of the judgment shall not be delayed for the taxing of costs"—to obviate the following of local practice to the contrary in, notably, the Southern and Eastern Districts of New York. Citations are given to cases showing the federal law of long standing in general accord with the intent of the rule, with particular citation of *The Washington*, 2 Cir., 16 F. 2d 206, that failure of the clerk to enter judgment as thus required is a "misprision" "not to be excused." See also Report of Proposed Amendments, October 1955, F. R. 58, stating a further formula for the judge's direction of entry; and the forms of judgment, Forms 30 and 31, *supra* note 1, with accompanying notes separately citing and relying on *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, and companion authorities cited *supra*.

of the Southern and Eastern Districts of New York, stating that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order."[3] Hence here everything necessary to start the appeal time running occurred on April 14.

Appellant objects that the docket entry of April 14 does not show the "substance" of the decision. Quite obviously it is not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment noted in earlier docket entries and that an opinion was available for the reading. But just as obviously, it was quite informative to the people really involved, the litigants, their counsel, and, indeed, the clerk. The face of the entry itself would tell them all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details when needed by the clerk to prepare a formalized judgment file, or by the parties to arrange to collect or pay the judgment. As a form of communication, therefore, the notation is wholly adequate to inform those for whom it was intended. It serves its real and obvious purpose of showing to these interested persons that the judge had arrived at a decision; for it is this reflection of the judge's state of mind which is decisive. [fol. 30] Of course it lies in the judge's power to postpone finality whether because he has not yet reached the point of judgment or whether because he wants to take time—with the help of counsel or without—to embody the result in his own prepared judgment. But when he shows adjudication, F. R. 58 provides for its simple and quick signification without delay for the elaboration so often cherished by winning counsel. See *United States* v. *Roth*, *supra*, 2 Cir., 208 F. 2d 467, 470.

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[3] The complete rule reads as follows:

"Rule 10—Orders

"(a) A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form."

Thus to look for the expression of judicial intent affords a reasonably clear touchstone as to the meaning and validity of docket notations of judgments. Of course this principle may not settle every case if trial judges are not careful to make a clear disclosure of intent, as they certainly should be urged to do. But judicial uncertainty may well postpone judgment, while satisfaction of some mere formality should not. Hence it seems undesirable, as well as impracticable, to require more by way of specification of detail for the docket notation. As we have seen, the rules make a clear distinction between the judgment itself and the brief notation thereof in the docket. It surely is impracticable to require a full statement of every judgment, including, for example, the long detail of an injunction; that would destroy any utility of the docket as a quick and ready reference to show the activities had in a case, and would make it not a series of "brief" notations, but a duplication of the judgment book. And it would end any endeavor to speed final adjudication, but would force that to await the submission and acceptance of formally prepared judgments. On the other hand, any attempt to require less, but still some, detail beyond this manifestation of judicial intent would mean chaos and confusion as the poor clerks attempted to determine how much less would be enough. There could easily be more litigation over this side issue than [fol. 3f] over the adjudication itself. Consider questions which might arise as to the omission of references to interest and costs.[4] The rule as drafted provides a workable means of handling a matter otherwise not without practical difficulties; it also serves the function of avoiding such purely useless delays—reflecting upon the courts in these days of popular public interest in more speedy

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[4] Presumably any self-contained notation would need the inclusion of these important items, as in the last docket entry herein quoted above; but interest on a money judgment is mandatory, 28 U. S. C. §1961, *cf.* the forms cited *supra* note 1, and a judgment is not to be delayed for the taxation of costs, see *supra* note 2. This would mean that the clerk must be more precise than the judge in deciding, i.e., that the clerk must presume to go beyond the judge's holding in making up the notation. But see the cases cited *infra* note 7.

justice—as that of almost a year in *United States* v. *Wissahickon Tool Works, supra*, 2 Cir., 200 F. 2d 936, taken merely to cast the judgment made into more formal language.[5] It should not be rendered quite useless (so much so that practicalities would then suggest its repeal for the local state rule of no judgment until settled with counsel) by the interpretation urged. And the precedents are to the contrary. See *United States* v. *Wissahickon Tool Works* and companion cited *supra*;[6] also Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Rule 58, pp. 59, 60, Forms 30, 31, pp. 68-70 and notes thereto; and 6 Moore's Federal Practice § 58.03[1], note 5 (2d Ed. 1953), specifically approving as a docket notation, [fol. 32] "Judgment for plaintiff enjoining the defendant pursuant to the prayer of the complaint entered."[7]

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[5] Even longer delays have been observed, as where a worthless shell of a patent declared invalid has continued in nominal existence for two years pending a formal entry of judgment. So there was no practical reason for the 40 days' delay of the present case, invited by the plaintiff in submitting a superfluous form of judgment.

[6] Other cases have been so dismissed on the call of our motion calendar, save in a few instances where a 30-day additional period may be made available to an appellant under F. R. 73(a) and as noted in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 471, at n. 1.

[7] Citing *Steccone* v. *Morse-Starrett Products Co.*, 9 Cir., 191 F. 2d 197, and *Willoughby* v. *Sinclair Oil & Gas Co.*, 10 Cir., 188 F. 2d 902, where notations of injunction judgments were quite abbreviated; and see also *In re Forstner Chain Corp.*, 1 Cir., 177 F. 2d 572, and *Porter* v. *Borden's Dairy Delivery Co.*, 9 Cir., 156 F. 2d 798, 799, as to judgments for defendants. In *United States* v. *Cooke*, 9 Cir., 215 F. 2d 528, 530, relied on by appellant, the judge's direction that judgment should enter "as prayed for in the complaint" was held sufficient, but the notation in the docket, "Filing decision (McLaughlin—Favor Plaintiff)" was held insufficient, as not telling what was granted, and the difference between that and the notation in the *Wissahickon* case was pointed out. Similarly in *Kam Koon Wan* v. *E. E. Black, Limited*, 9 Cir., 182 F. 2d 146, the notation was only for a partial judgment which could not even be final.

In general, since our own rulings have been so definitive, decisions from other circuits are not necessarily helpful, particularly because the language of a trial judge often needs to be interpreted

We conclude, therefore, that the practice heretofore sanctioned by us represents a correct interpretation of the governing rules, as well as a wise and practicable principle materially aiding in the expeditious determination of civil cases. Accordingly the appeal must be dismissed as not timely filed.

Motion to dismiss granted; appeal dismissed.

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against a local background, just as here we need to have in mind our local practice, including Rule 10 of the court below quoted in note 3 *supra*. But as we have just indicated, we have found no decision contrary as to the form and intent of the docket notation. With reference to the other point, namely, the effect of a judge's memorandum and direction when docketed as a judgment, there has been some division, three circuits—the First and Ninth and our own—supporting the view herein stated, while two others seem in varying degrees and not overclearly contrary. See *In re Forstner Chain Corp.*, *supra*, 1 Cir., 177 F. 2d 572; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, *supra*, 2 Cir., 223 F. 2d 28; *Anderson* v. *Continental Steamship Co.*, 2 Cir., 218 F. 2d 84, 86; *Steccone* v. *Morse-Starrett Products Co.*, *supra*, 9 Cir., 191 F. 2d 197; but *cf. Healy* v. *Pennsylvania R. Co.*, 3 Cir., 181 F. 2d 934; *Brown* v. *United States*, 8 Cir., 225 F. 2d 861. See Commentary, *Entry of Judgment*, 18 Fed. Rules Serv. 927; and see also Report of Proposed Amendments, October 1955, p. 60, *supra* note 1, accepting the majority view as "declaratory of existing law" and recommending an amendment to carry it more clearly into effect.

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: HON. CHARLES E. CLARK, *Chief Judge*; HON. JEROME N. FRANK, HON. HAROLD R. MEDINA, HON. CARROLL C. HINCKS, HON. J. EDWARD LUMBARD, HON. STERRY R. WATERMAN, *Circuit Judges*.

The F. and M. Schaefer Brewing Co.,
Plaintiff-Appellee

v.

United States of America,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of New York

JUDGMENT—Filed September 12, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

[fol. 34] (File Endorsement Omitted)

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36]

SUPREME COURT OF THE UNITED STATES
No. ....., October Term, 1956.

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 30, 1956

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 9, 1957.

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this November 30/56.
day of ..... 1956.

[fol. 37]

SUPREME COURT OF THE UNITED STATES
No. 761 ....., October Term, 1956

(Title Omitted)

[fol. 38]

ORDER ALLOWING CERTIORARI—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 433025 74

No. [redacted] 79

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE F. & M. SCHAEFER BREWING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General,
JOHN N. STULL,
Acting Assistant Attorney General,
HILBERT P. ZARKY,
KARL SCHMEIDLER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

415929—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE F. & M. SCHAEFER BREWING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The memorandum decision of the District Court (Appendix A, *infra*, pp. 16–18) is not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 20–29) is reported at 236 F. 2d 889.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1956. (Appendix A, *infra*, pp. 29–30.) On November 30, 1956, the time within which to file a petition for a writ of certiorari was

extended, by an order of Mr. Justice Harlan, to February 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, under the Federal Rules of Civil Procedure, the appeal time ran from the date of the District Court's memorandum decision, and of a docket entry stating that taxpayer's motion for summary judgment had been granted, or from the later date on which the formal judgment was signed and a docket entry made stating "Judgment filed and docketed" and giving the amount of the judgment.

RULES INVOLVED

Federal Rules of Civil Procedure:

> Rule 54. JUDGMENTS; COSTS.
>
> (a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.
>
> * * * * *
>
> Rule 58 [As amended December 27, 1946]. ENTRY OF JUDGMENT.
>
> Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only

money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73 [As amended December 27, 1946, and December 29, 1948]. APPEAL TO A COURT OF APPEALS.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

A party may appeal from a judgment by filing with the district court a notice of appeal. * * *

* * * * *

Rule 79 [As amended December 27, 1946, and December 29, 1948]. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) *Civil Docket.* The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

* * * * *

STATEMENT

The facts as found by the Court of Appeals (Appendix A, *infra*, pp. 21–22) may be summarized as follows:

In a refund suit, taxpayer alleged payment of documentary stamp taxes in the amount of $7,189.57 which it claimed was illegally assessed and collected, and demanded "judgment against defendant in the sum of $7,189.57, interest and costs." (Appendix A, *infra*, p. 21.) Upon joinder of issue, taxpayer moved for summary judgment. (Appendix A, *infra*, p. 22.) On April 14, 1955, the district judge issued a memorandum decision which concluded by stating "the plaintiff's motion is granted." (Appendix A, *infra*, p. 18.) On the same day the clerk made the following docket entry (Appendix A, *infra*, p. 15):

> April 14 Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.

On May 24, 1955, a formal judgment was signed by the district judge which set forth the amounts recovered by the taxpayer together with interest and costs. (Appendix A, *infra*, p. 19.) On that day the clerk made the following entry in his docket (Appendix A, *infra*, pp. 15–16):

> May 24 Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $524.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.

The Government filed its notice of appeal on July 1, 1955. (Appendix A, *infra*, p. 22.) The Court of Appeals, upon adjudication by the full court, dis-

missed the Government's appeal as not timely filed. (Appendix A, *infra*, pp. 20–29.)

REASONS FOR GRANTING THE WRIT

The decision below, holding that the memorandum decision of the district judge which granted the taxpayer's motion for summary judgment, rather than the formal judgment which the judge signed at a later date, was the judgment, and that the clerk's notation of the memorandum decision, rather than his notation of the later judgment, was the entry of judgment which determined the period within which notice of appeal could be filed, raises an important procedural question of general applicability concerning the proper construction to be placed upon Rules 58 and 79 (a) of the Federal Rules of Civil Procedure, *supra*, pp. 2–4.

This question, on which the lower courts have expressed conflicting views, raises jurisdictional issues which, we believe, should be settled by this Court in order that litigants may know with certainty when an appeal from a judgment of a district court will be timely. By resolving the present differences between the courts of appeals concerning the proper interpretation to be given the rules, this Court can create certainty in an area where certainty is essential.

1. The decision below is in conflict with *United States* v. *Higginson*, 238 F. 2d 439 (C. A. 1); *Cedar Creek Oil and Gas Co.* v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9); and *Papanikolaou* v. *Atlantic Freighters*, 232 F. 2d 663 (C. A. 4). It is also out of harmony with this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802.

"The problem of what constitutes a final judgment has been treated by most of the circuit courts, but without a great degree of uniformity." *United States* v. *Higginson, supra,* p. 442. This lack of uniformity is exemplified by the application of the rules by the court below in the present case, the conflicting views of the First Circuit in the subsequent decision in the *Higginson* case, *supra,* and by the decision of the court below in the later case of *Matteson* v. *United States,* decided December 31, 1956. (Appendix B, *infra,* pp. 31—36).[1]

In the present case, as we have noted, the district judge's memorandum decision, in which the granting of the taxpayer's motion for summary judgment was announced, was held to be the judgment and the clerk's notation of the decision in the civil docket was held to be the entry of judgment which started the appeal period under Rule 73 (a) (*supra,* p. 3). The subsequent, formal judgment signed by the judge and the entry of that judgment by the clerk were considered "ineffective to delay the judgment or extend the time of appeal." (Appendix A, *infra,* p. 24.) In the *Higginson* case, however, the memorandum opinion of the district judge, which stated that "judgment must be entered for the plaintiffs" (238 F. 2d at 442), was held not to be the judgment, and the notation of that adjudication made by the clerk in the civil docket was held not to be the entry of judgment. Instead, the formal judgment, signed at a later date

[1] Without urging the correctness of, but because of, the decision in *Schaefer*, the Government raised the jurisdictional question before the Second Circuit in *Matteson*.

by the judge, was held to be the judgment and the notation of that judgment by the clerk was held to be the entry of judgment which marked the commencement of the appeal period. The First Circuit, relying on this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802, and on its own prior decision in *In re Forstner Chain Corp.*, 177 F. 2d 572 (C. A. 1), stated (per Hartigan, J., 238 F. 2d at 442):

> * * * it can be gathered from the language of the formal judgment of February 23, 1956, and from the fact of its rendition and entry that neither the district judge nor the clerk regarded the reference in the opinion nor the first entry as a judgment or entry of judgment.

In the present case, the court stated that its conclusion (*i. e.*, that the memorandum decision was the judgment contemplated by the Federal Rules of Civil Procedure) was fortified by Rule 10 (a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York to the effect that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order." (Appendix A, *infra*, pp. 24–25.) In the *Higginson* case, the First Circuit noted that no similar local rule was there involved; it stated, however (238 F. 2d at 443): "To the extent that the language of the *Schaefer* opinion might apply even where no such local rule exists, this decision is not in accord with it."

That the present case was not decided on the basis of the local rule and that there is a direct conflict between these circuits regarding the proper appli-

cation of the Rules is evidenced by the Second Circuit's later decision in *Matteson* v. *United States, supra.* Judge Clark, again speaking for the court, explained that in the present case (Appendix B, *infra*, p. 32) "we viewed the local rule as merely corroborative of the practice actually required by F. R. 58" and stated that "Judge Hartigan's opinion must be taken as disapproving our reasoning." Summarizing the conflicting views of these two circuits, the *Matteson* opinion states (Appendix B, *infra*, p. 33):

> But what points up our difference of view is that we do not think the trial judge's original statement is subject to reassessment and definition on the basis of his having later signed a formal judgment presented to him by counsel, whereas our brothers of the First Circuit conclude that his later action demonstrates that his first action was not intended to be a final adjudication.

Cedar Creek Oil and Gas Co. v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9), is another recent example of disagreement in this area. In that case the trial judge had issued a memorandum opinion, together with findings of fact and conclusions of law which stated that the defendant was entitled to prevail and which concluded by stating that "Judgment is hereby Ordered to be entered accordingly" (238 F. 2d at 299). The clerk's notation recited, among other things, that there had been "[f]iled and entered judgment in favor of defendants * * *." The court of appeals held, however, that the time for appeal started to run later when a formal judgment had been signed and notation thereof had been made by

the clerk. Commenting on the judge's signing of a formal judgment and the clerk's notation of it, the court said: "It should not be presumed or assumed they had an intent to do a useless act. If the first acts are ambiguous, we think the later acts afford circumstantial evidence of the intent in the first acts" (238 F. 2d at 301).

The Fourth Circuit, contrary to the Second Circuit, has also regarded the signing of a formal judgment as being inconsistent with a conclusion that a prior announcement of adjudication was the judgment. In *Papanikolaou* v. *Atlantic Freighters,* 232 F. 2d 663 (C. A. 4), a memorandum opinion signed and filed by the district judge which stated that the suit was dismissed was held not to be the judgment in view of the fact that the district judge had later signed a "final order" decreeing that the suit be dismissed. Pointing to the fact that "the judge deemed it necessary or desirable to file a formal judgment of dismissal" (232 F. 2d at 665), the court concluded that the parties "were justified in regarding this as the final judgment disposing of the case."

While *United States.* v. *Hark,* 320 U. S. 531, was a criminal case, the views of this Court concerning the significance that attaches to the signing of a formal order by the district judge cannot be reconciled with those of the Second Circuit in the present case as well as in *Matteson* v. *United States, supra.* The opinion in *Hark* states (pp. 534–535):

> Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an

> opinion or a docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

In sum, because, as was noted in the *Higginson* case (238 F. 2d at 442), "the Federal Rules do not spell out the meaning of a 'final judgment'" and the terms used "have to be judicially defined if the rules are to be meaningful," and because of the conflicting decisions of the courts of appeals, an authoritative ruling by this Court is necessary.

2. The decision below is also in direct conflict with *United States* v. *Cooke,* 215 F. 2d 528 (C. A. 9), on the proper interpretation of Rule 79 (a). The entry of judgment, which starts the appeal period under Rule 73 (a) must be a notation in the civil docket, as provided for in Rule 58. Rule 79 (a) requires that the notation show "the substance of each order or judgment of the court * * *."

In *Cooke,* a case involving a suit for refund of taxes and interest, the district judge had filed a decision stating that judgment should enter for the plaintiff "as prayed for in the complaint" and the docket entry read "Filing decision (McLaughlin—

Favor Plaintiff)." The court held that this notation, since it did not state the amounts to be recovered by the plaintiff, did not show the substance of the judgment and, accordingly, was not the entry of judgment which would commence the appeal period. The opinion states (215 F. 2d at 530): "We think that the bare statements of the names of the successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments."

In the present case, on the contrary, the docket entry, which indicated no more than the granting of the motion for summary judgment and which referred to the opinion on file, was held to show the substance of the judgment. The court below, conceding (Appendix A, *infra*, p. 25) that the docket entry was "not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment * * *," nevertheless concluded (Appendix A, *infra*, p. 25) that "The face of the entry itself would tell them [the litigants] all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details * * *." But in *Cooke*, on the contrary, the court held that the fact that an examination of the pleadings would reveal the amount of the judgment to which the plaintiff was entitled, "does not give the *entries* the *substance* of those amounts." The *Cooke* case states (215 F. 2d at 530):

> If the nature of the judgment entries is to be determined only after an examination of the issues presented by the parties' respective pleadings, there would be no necessity for Rule 79 (a) providing the entry must show the substance of the judgment.

In *United States* v. *Higginson, supra,* while the First Circuit found it unnecessary to reach the question whether the docket entry showed the substance of the judgment, it referred to the *Cooke* decision and concluded that the failure to include in the *Higginson* entry the amount to be recovered by the plaintiff was a "further indication that this notation in the docket was not to be an entry of final judgment." (238 F. 2d at 443). See also *Brown* v. *United States,* 225 F. 2d 861 (C. A. 8).

3. The issues presented by this petition are of obvious importance, affecting as they do all litigants in the federal courts. The importance was recognized by the Court of Appeals for the Second Circuit which adopted the unusual procedure of having the full membership of the court consider this case. The present, conflicting views of the courts of appeals concerning the timeliness of appeals should be resolved so that controversies may be decided on their merits and so that appeals will not be dismissed simply because an appellant is unable to determine from the rules when an appeal is timely. The existing "patchwork" which makes it "difficult to know just when, in appellate eyes, a litigant has a judgment" (*Matteson* v. *United States, supra,* Appendix B, *infra,* p. 34) can be remedied only by definitive

clarification by this Court, to the end that the Federal Rules will perform their function of securing (Rule 1) "the just, speedy, and inexpensive determination of every action."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
JOHN N. STULL,
Acting Assistant Attorney General.
HILBERT P. ZARKY,
KARL SCHMEIDLER,
Attorneys.

FEBRUARY 1957.

APPENDIX A

In the United States District Court for the Eastern District of New York

Civil No. 14715

THE F. & M. SCHAEFER BREWING CO., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

1954	
August 31	Complaint filed. Summons issued.
September 1	Summons returned and filed. Defendant served.
November 1	Answer filed.
December 29	Notice of Motion filed for summary judgment.
1955	
January 12	Abruzzo, *J.* Motion for summary judgment adj. to 2-9-55.
February 9	Rayfiel, *J.* Motion for summary judgment adj. to 2-23-55.
February 23	Rayfiel, *J.* Hearing on motion for summary judgment. Motion argued and submitted. Decision reserved. All papers in by 3-5-55.
April 14	Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.
May 24	Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 to-

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	gether with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.
July 21	Notice of Appeal filed.
August 23	Record on Appeal Certified.
"	Record on Appeal with three copies of Index mailed to Clerk of Court of Appeals.
August 26	Receipt from Court of Appeals filed re Record on Appeal.

[Caption omitted]

MEMORANDUM DECISION

Appearances: White & Case, Esqs., Attorneys for Plaintiff By E. W. Pavenstedt, Esq., for the motion Leonard P. Moore, Esq., U. S. Attorney for Defendant; by Elliot Kahaner, Esq., in opposition

RAYFIEL, *J.*

The plaintiff herein moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The parties agree as to the facts, which are as follows: the plaintiff, a New York corporation, had an authorized capital of 200,000 shares of $12 non-cumulative second preferred stock, without par value, having a stated value of $36.25 per share, and 6500 shares of common stock, the par value of which was $100 per share. Prior to March 21, 1951, there were issued and outstanding, 100,000 shares of the $12 non-cumulative second preferred stock and 1,000 shares of the common stock. 100,000 shares of the said preferred stock and 1,000 shares of the common stock were held as Treasury stock, and 4,500 shares of the common stock were still unissued. The plaintiff's capital was $3,725,000.

On March 21 1951, pursuant to appropriate action of its Board of Directors, the plaintiff increased the amount of its capital from $3,725,000 to $10,100,000. This was done by transferring the sum of $6,375,000 from its earned surplus account to its capital account. This bookkeeping entry increased the capital represented by each of the issued and outstanding 100,000 shares of no par value second preferred stock from $36.25 to $100 per share. No additional shares were issued. At the same time the 100,000 shares of the preferred stock and the 1000 shares of common stock held by the corporation as Treasury stock were retired and cancelled.

The plaintiff did not affix any Federal documentary stamps to its stock books or other records. Subsequently, and after an examination of the corporation's books and records by agents of the Internal Revenue Service, a tax of $7012.50, together with interest in the amount of $177.07, was assessed against the corporation, pursuant to section 1802 (a) of the Internal Revenue Code of 1939. The corporation paid the assessment, together with interest, and now sues to recover it on the ground that it was erroneously and illegally assessed and collected.

The facts in the case at bar are almost identical with those in the case of *U. S.* v. *National Sugar Refining Co.* 113 Fed. Supp. 157, decided by Judge Leibell on April 30, 1953. He held that, "Section 1802 (a) is a tax on an original issue of capital stock. *It is not a tax on an addition to capital, made by a transfer from surplus to capital, where no new stock is issued.* The cases show that the stamp tax is, as L. Hand, *C. J.*, put it, 'an excise upon the act of issuance', to be imposed only once when the original certificate is issued. *Empire Trust Co.* v. *Hoey*, 2 Cir., 103 F. 2d 430 at page 432." [Emphasis added.]

After an analysis of the pertinent regulations of the Internal Revenue Bureau (113.20, T. 26, Parts 80 to 169, C. F. R. 1949 edition) Judge Leibell stated, at page 161, "The constant repetition of the words 'issue' and 'issued' in these Regulations emphasizes the point that it is when shares or certificates are issued that the stamp tax impinges on the transaction. An increase in the capital of a corporation by the transfer of part of its earned surplus to the capital account for its outstanding shares of no par value stock does not require the corporation to pay a stamp tax under section 1802 (a), if no shares or certificates are issued as part of the transaction. But if shares or certificates are subsequently issued against the increase in capital thus created, a stamp tax under section 1802 (a) would, I believe, become payable. *Unless there are both the addition to capital and the issuance of new shares or certificates under the recapitalization, no stamp tax is payable under section 1802 (a) as amended August 8, 1947.*

If the Congress had intended that a tax should be imposed on an increase of capital resulting from a transfer of earned surplus to capital it would have said so. If this fact situation constitutes an unforeseen 'loophole' in the tax structure, in particular section 1802 (2) of the Internal Revenue Act, the Congress can take care of that also." [Emphasis added.]

I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted.

Dated: April 14 1955.

LEO F. RAFIEL,
United States District Judge.

[Caption omitted]

JUDGMENT

The plaintiff having moved for summary judgment under Rule 56 R. C. P. and said motion having come on to be heard on February 23, 1955, and the parties having appeared and having presented their papers and arguments and after due consideration the plaintiff's motion for summary judgment having been granted on April 14, 1955, and the Court's opinion having been duly filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor.

APPROVED

Dated: Brooklyn, New York, May 24th, 1955.

LEO F. RAYFIEL,
U. S. D. J.

Judgment Rendered:
Dated: May 24th, 1955.

PERCY G. B. GILKES, *Clerk.*
By: SIDNEY R. FEUER, *Deputy Clerk.*

In the United States Court of Appeals For th
Second Circuit.

No. 152—October Term, 1955
(Argued January 20, 1956—Decided September 1
1956)

Docket No. 23775

The F. & M. Schaefer Brewing Co.,
PLAINTIFF-APPELLEE

v.

United States of America, DEFENDANT-APPELLANT

Before Clark, *Chief Judge*, and Frank, Medin
Hincks, Lumbard, and Waterman, *Circuit Judges*.

Appeal from the United States District Court fo
the Eastern District of New York, Leo F. Rayfie
Judge.

The United States of America appeals from a sum
mary judgment, D. C. E. D. N. Y., 130 F. Supp. 32
for the refund of stamp taxes paid it by The F. & M
Schaefer Brewing Co., and the latter moves to dismis
the appeal as not timely brought. Motion granted
appeal dismissed.

Thomas C. Burke, New York City (White
Case, Walter S. Orr, and Edmund W. Pa
enstedt, New York City, on the brief), *fo
plaintiff-appellee*.

Karl Schmeidler, Atty., Dept. of Justic
Washington, D. C. (H. Brian Holland, Ass
Atty. Gen., and Ellis N. Slack, Atty., Dep
of Justice, Washington, D. C., and Leonar
P. Moore, U. S. Atty., and Elliott Kahane
Asst. U. S. Atty., E. D. N. Y., Brooklyn
N. Y., on the brief), *for defendant-appellan*

CLARK, *Chief Judge:*

The plaintiff sued to recover the amount of stamp taxes which it alleged the government had illegally assessed and collected from it. The transaction which the government claimed to be thus subject to the tax in question did not involve the issue of any new stock certificates, but was actually an increase in the corporation's capital account by the transfer of $6,375,000 from its earned surplus account to its capital account, thus increasing the capital from $3,725,000 to $10,100,000, and the value of certain issued no-par-value stock from $26.25 to $100 per share. In a reasoned opinion, D. C. E. D. N. Y., 130 F. Supp. 322, Judge Rayfiel granted the plaintiff's motion for summary judgment for the refund, quoting and relying upon the detailed exposition in *United States* v. *National Sugar Refining Co.*, D. C. S. D. N. Y., 113 F. Supp. 157. Where Judge Leibell held that stamp taxes are required only on the issuance of capital stock, and not on a bookmaking transfer assigning greater capital assets to already issued stock. But we do not reach the merits, since we dispose of the appeal on a motion made by appellee to dismiss it on the ground that it was not timely taken. Originally the issues were argued before a panel of this court consisting of Judges Medina, Hincks, and Waterman; but since the motion presented an important question of practice and procedure going beyond the fortunes of this particular case, we determined that adjudication should be made by the full personnel of active circuit judges.

The facts on which disposition of this issue turns are as follows: By its complaint filed August 31, 1954, the plaintiff-appellee alleged payment on February 19, 1954, of documentary stamp taxes in the amount of $7,189.57 and demanded "judgment against defendant in the sum of $7,189.57, interest and costs."

The alleged payment was admitted in the defendant's answer. On December 29, 1954, the plaintiff moved for summary judgment upon three affidavits showing in detail the tax payment of $7,189.57, and the grounds upon which it had been compelled, and also that no refund or credit had been made thereon. On April 14, 1955, Judge Rayfiel signed the memorandum decision directed to said motion, which is reported in 130 F. Supp. 322–324 and which concludes: "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." Thereupon the clerk made a docket entry as follows: "April 14 Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file." On May 24, 1955, the judge signed a formal "Judgment," as submitted by the plaintiff, for the recovery from the defendant of "the sum of $7,189.57 and interest thereon from February 19, 1954, in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37." This document was stamped: "Judgment Rendered: Dated: May 24th, 1955. Percy G. B. Gilkes, Clerk." Thereupon an entry was made in the clerk's docket as follows: "May 24 Rayfiel, J. Judgment filed and docketed against defendant in the sum of $7,189.57 with interest of $542.80 together with costs $37 amounting in all to $7,769.37. Bill of Costs attached to judgment."

The defendant filed its notice of appeal on July 21, 1955, or 96 days from the original grant of summary judgment and 58 days from the filing of the formalized judgment signed by the judge. Under F. R. C. P., rule 73 (a) the United States has 60 days from "the entry of the judgment appealed from" in which to appeal, with a possible additional 30 days where granted by the district court upon a showing of

excusable neglect in failing to learn of the entry. In our view the entry of judgment was on April 14, and the appeal is too late.

The governing principle is found in F. R. 58, which states as to non-jury cases: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs." In addition, F. R. 79 (a) requires the clerk to keep a book known as a "civil docket," in which each civil action shall be entered with its file number and where "All papers filed with the clerk * * *, all appearances, orders, verdicts, and judgments shall be noted chronologically" on the folio assigned to the action. The rule continues: "These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made." The rules also make provision for formal judgments, F. R. 79 (b), their form, F. R. 54 (a),[1] and suitable indices thereto by the clerk, F. R. 79 (c).

As we have held, these rules contemplate some decisive and complete act of adjudication by the dis-

[1] Compare forms of judgments, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Forms 30 and 31, pp. 68–70.

trict judge; when this is done, and notation thereof made in the civil docket, the judgment is complete without other formal documents which, if filed, are ineffective to delay the judgment or extend the time of appeal. See, e. g., *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, the notation of a grant of summary judgment, as here; and see also *Leonard* v. *Prince Line*, 2 Cir., 157 F. 2d 987, 989; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481, 485; *Binder* v. *Commercial Travelers Mut. Acc. Ass'n of America*, 2 Cir., 165 F. 2d 896, 901; *Markert* v. *Swift & Co.*, 2 Cir., 173 F. 2d 517, 519, n. 1; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, 2 Cir., 223 F. 2d 28; *In re Nuese's Estate*, 15 N. J. 149, 152, 104 A. 2d 281, 282. The history of F. R. 58 and its amendments, designed to strengthen it, as stated in the footnote,[2] demonstrate that this was the intent of the rule. Its purpose is also advanced—as we pointed out in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 469—by Rule 10 (a) of the Southern and Eastern

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[2] In the successive Notes to F. R. 58 appearing in the Preliminary Draft, May 1944, the Second Preliminary Draft, May 1945, and the Report of Proposed Amendments, June 1946, at page 76, there is a statement of the reasons for the changes made—including the express mandate that the "entry of the judgment shall not be delayed for the taxing of costs"—to obviate the following of local practice to the contrary in, notably, the Southern and Eastern Districts of New York. Citations are given to cases showing the federal law of long standing in general accord with the intent of the rule, with particular citation of *The Washington*, 2 Cir., 16 F. 2d 206, that failure of the clerk to enter judgment as thus required is a "misprision" "not to be excused." See also Report of Proposed Amendments, October 1955, F. R. 58, stating a further formula for the judge's direction of entry; and the forms of judgment, Forms 30 and 31, *supra* note 1, with accompanying notes separately citing and relying on *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, and companion authorities cited *supra*.

Districts of New York, stating that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order."[3] Hence here everything necessary to start the appeal time running occurred on April 14.

Appellant objects that the docket entry of April 14 does not show the "substance" of the decision. Quite obviously it is not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment noted in earlier docket entries and that an opinion was available for the reading. But just as obviously, it was quite informative to the people really involved, the litigants, their counsel, and, indeed, the clerk. The face of the entry itself would tell them all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details when needed by the clerk to prepare a formalized judgment file, or by the parties to arrange to collect or pay the judgment. As a form of communication, therefore, the notation is wholly adequate to inform those for whom it was intended. It serves its real and obvious purpose of showing to these interested persons that the judge had arrived at a decision; for it is this reflection of the judge's state of mind which is decisive. Of course it lies in the judge's power to postpone finality whether because

[3] The complete rule reads as follows:

"Rule 10—Orders

"(a) A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form."

he has not yet reached the point of judgment or whether because he wants to take time—with the help of counsel or without—to embody the result in his own prepared judgment. But when he shows adjudication, F. R. 58 provides for its simple and quick signification without delay for the elaboration so often cherished by winning counsel. See *United States* v. *Roth, supra,* 2 Cir., 208 F. 2d 467, 470.

Thus to look for the expression of judicial intent affords a reasonably clear touchstone as to the meaning and validity of docket notations of judgments. Of course this principle may not settle every case if trial judges are not careful to make a clear disclosure of intent, as they certainly should be urged to do. But judicial uncertainty may well postpone judgment, while satisfaction of some mere formality should not. Hence it seems undesirable, as well as impracticable, to require more by way of specification of detail for the docket notation. As we have seen, the rules make a clear distinction between the judgment itself and the brief notation thereof in the docket. It surely is impracticable to require a full statement of every judgment, including, for example, the long detail of an injunction; that would destroy any utility of the docket as a quick and ready reference to show the activities had in a case, and would make it not a series of "brief" notations, but a duplication of the judgment book. And it would end any endeavor to speed final adjudication, but would force that to await the submission and acceptance of formally prepared judgments. On the other hand, any attempt to require less, but still some, detail beyond this manifestation of judicial intent would mean chaos and confusion as the poor clerks attempted to determine how much less would be enough. There could easily be more litigation over this side issue than over the

adjudication itself. Consider questions which might arise as to the omission of references to interest and costs.[4] The rule as drafted provides a workable means of handling a matter otherwise not without practical difficulties; it also serves the function of avoiding such purely useless delays—reflecting upon the courts in these days of popular public interest in more speedy justice—as that of almost a year in *United States* v. *Wissahickon Tool Works, supra,* 2 Cir., 200 F. 2d 936, taken merely to cast the judgment made into more formal language.[5] It should not be rendered quite useless (so much so that practicalities would then suggest its repeal for the local state rule of no judgment until settled with counsel) by the interpretation urged. And the precedents are to the contrary. See *United States* v. *Wissahickon Tool Works* and companion cases cited *supra;*[6] also Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Rule 58, pp. 59, 60, Forms 30, 31, pp. 68–70 and

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[4] Presumably any self-contained notation would need the inclusion of these important items, as in the last docket entry herein quoted above; but interest on a money judgment is mandatory, 28 U. S. C. § 1961, *cf.* the forms cited *supra* note 1, and a judgment is not to be delayed for the taxation of costs, see *supra* note 2. This would mean that the clerk must be more precise than the judge in deciding, i. e., that the clerk must presume to go beyond the judge's holding in making up the notation. But see the cases cited *infra* note 7.

[5] Even longer delays have been observed, as where a worthless shell of a patent declared invalid has continued in nominal existance for two years pending a formal entry of judgment. So there was no practical reason for the 40 days' delay of the present case, invited by the plaintiff in submitting a superfluous form of judgment.

[6] Other cases have been so dismissed on the call of our motion calendar, save in a few instances where a 30-day additional period may be made available to an appellant under F. R. 73 (a) and as noted in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 471, at n. 1.

notes thereto; and 6 Moore's Federal Practice ¶ 58.03[1], note 5 (2d Ed. 1953), specifically approving as a docket notation, "Judgment for plaintiff enjoining the defendant pursuant to the prayer of the complaint entered."[7]

[7] Citing *Steccone* v. *Morse-Starrett Products Co.*, 9 Cir. 191 F. 2d 197, and *Willoughby* v. *Sinclair Oil & Gas Co.*, 10 Cir., 188 F. 2d 902, where notations of injunction judgments were quite abbreviated; and see also *In re Forstner Chain Corp.*, 1 Cir., 177 F. 2d 572, and *Porter* v. *Borden's Dairy Delivery Co.*, 9 Cir., 156 F. 2d 798, 799, as to judgments for defendants. In *United States* v. *Cooke*, 9 Cir., 215 F. 2d 528, 530, relied on by appellant, the judge's direction that judgment should enter "as prayed for in the complaint" was held sufficient, but the notation in the docket, "Filing decision (McLaughlin—Favor Plaintiff)" was held insufficient, as not telling what was granted, and the difference between that and the notation in the *Wissahickon* case was pointed out. Similarly in *Kam Koon Wan* v. *E. E. Black, Limited*, 9 Cir., 182 F. 2d 146, the notation was only for a partial judgment which could not even be final.

In general, since our own rulings have been so definitive, decisions from other circuits are not necessarily helpful, particularly because the language of a trial judge often needs to be interpreted against a local background, just as here we need to have in mind our local practice, including Rule 10 of the court below quoted in note 3 *supra*. But as we have just indicated, we have found no decision contrary as to the form and intent of the docket notation. With reference to the other point, namely, the effect of a judge's memorandum and direction when docketed as a judgment, there has been some division, three circuits—the First and Ninth and our own—supporting the view herein stated, while two others seem in varying degrees and not overclearly contrary. See *In re Forstner Chain Corp.*, *supra*, 1 Cir., 177 F. 2d 572; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, *supra*, 2 Cir., 223 F. 2d 28; *Anderson* v. *Continental Steamship Co.*, 2 Cir., 218 F. 2d 84, 86; *Steccone* v. *Morse-Starrett Products Co.*, *supra*, 9 Cir., 191 F. 2d 197; but *cf. Healy* v. *Pennsylvania R. Co.*, 3 Cir., 181 F. 2d 934; *Brown* v. *United States*, 8 Cir., 225 F. 2d 861. See Commentary, *Entry of Judgment*, 18 Fed. Rules Serv. 927; and see also Report of Proposed Amendments, October 1955, p. 60, *supra* note 1, accepting the majority view as "declaratory of existing law" and recommending an amendment to carry it more clearly into effect:

We conclude, therefore, that the practice heretofore sanctioned by us represents a correct interpretation of the governing rules, as well as a wise and practicable principle materially aiding in the expeditious determination of civil cases. Accordingly the appeal must be dismissed as not timely filed.

Motion to dismiss granted; appeal dismissed.

In the United States Court of Appeals for the Second Circuit

THE F. & M. SCHAEFER BREWING CO.,
PLAINTIFF-APPELLEE,

v.

UNITED STATES, DEFENDANT-APPELLANT

JUDGMENT

NOTE.—[Stamped:] United States Court of Appeals, Second Circuit. Filed September 12, 1956. A. DANIEL FUSARO, *Clerk*.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of September, one thousand nine hundred and fifty-six.

Present: Hon. CHARLES E. CLARK, *Chief Judge;* and Hon. JEROME N. FRANK, Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, *Circuit Judges*

THE F. AND M. SCHAEFER BREWING CO., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A true copy.

A. DANIEL FUSARO, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Second Circuit

No. 112—October Term, 1956

(Argued December 7, 1956—Decided December 31, 1956)

Docket No. 24214

GRACE M. MATTESON, AS SURVIVING EXECUTRIX OF THE LAST WILL AND TESTAMENT OF EDWARD M. MARKHAM, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before CLARK, *Chief Judge*, and FRANK and LUMBARD, *Circuit Judges*

Appeal from the United States District Court for the Northern District of New York, JAMES T. FOLEY, *Judge*

The defendant moves to dismiss, as not timely filed, an appeal by the plaintiff-executrix from the dismissal of her action for the refund of estate taxes. Appeal dismissed.

WILFORD A. LE FORESTIER, Troy, N. Y. (Draper & Bartle, Troy, N. Y., on the brief), *for plaintiff-appellant.*

CHARLES B. E. FREEMAN, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., and Lee A. Jackson and Harry Baum, Atty's., Dept. of Justice, Washington,

D. C., and Theodore F. Bowes, U. S. Atty., N. D. N. Y., Syracuse, N. Y., on the brief), *for defendant-appellee.*

CLARK, *Chief Judge:*

Defendant asks us to dismiss as untimely this appeal taken by the plaintiff from the dismissal of her complaint in an action for the refund of estate taxes. Plaintiff's notice of appeal was filed 113 days after the judge had filed a memorandum-decision dismissing the complaint, and 56 days after the entry of a formal judgment to like effect signed by him at defendant's request. Under F. R. C. P., rule 73 (a), her appeal must be taken within 60 days from judgment. In accordance with our decisions, reanalyzed and reappraised by the full court in *The F. & M. Schaefer Brewing Co.* v. *United States,* 2 Cir., 236 F. 2d 889, the appeal is untimely and must be dismissed. We find no support in the record for plaintiff's contention that Judge Foley's failure to append his signature to the memorandum-decision showed his intent to delay judgment; we have no basis for judicial notice of so odd a method of signifying intent and in any event do not feel that the clear provisions of F. R. 58 can be limited or varied by such subjective reactions of the trier.

We would stop here but that a distinguished Court of Appeals has now viewed our *Schaefer* holding as dependent on a local district court rule and has rendered a decision which it states not to be in accord with the language of our opinion to the extent that the latter may apply even where no such local rule exists. *United States* v. *Higginson,* 1 Cir., Nov. 16, 1956. Since we viewed the local rule as merely corroborative of the practice actually required by F. R. 58, Judge Hartigan's opinion must be taken as disapproving our reasoning. True, there is room for

distinction on the facts so far as disclosed; unlike our present case, which is an outright dismissal of the complaint, the lower court adjudication there was for recovery of a very substantial sum of money with interest which (so far as the slip opinion shows) was not shown in the judge's first direction. Moreover, as we have pointed out, the issue always turns on the trial judge's declared intent as to the judgment; and where he has not made that clear, some interpretation is necessary.[1] But what points up our difference of view is that we do not think the trial judge's original statement is subject to reassessment and definition on the basis of his having later signed a formal judgment presented to him by counsel, whereas our brothers of the First Circuit conclude that his later action demonstrates that his first action was not intended to be a final adjudication. We think that this formulation of the governing rule will have untoward results in practice which have apparently not been contemplated so far as appears from the rather summary discussion in *United States* v. *Higginson*, *supra*.

We suggest that if a district judge makes a practice of signing formal judgments later presented to him by counsel, there will necessarily result a nullification of the mandate of F. R. 58 that when "the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction." Nor can we seriously doubt that this is contrary to

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[1] There seems no basis for doubt here. At the end of Judge Foley's four-page reasoned "Memorandum-Decision" he says: "As my findings of fact, I adopt the agreed facts stipulated. My conclusion is that the plaintiff is not entitled to recover; the complaint is dismissed and a judgment to such effect may enter for the defendant." And the docket entry as of the date filed was: "Filed Memorandum-Decision—Judge Foley—dismissing complaint and judgment to such effect may enter for the defendant."

the intent of the rule; for the Advisory Committee has been articulate in showing that in its recommendations to the Supreme Court it has continuously pressed for rules requiring prompt entry of judgments without delay which is occasioned by awaiting the action of counsel. This is made clear in the Committee Notes cited and discussed in some detail in the *Schaefer* opinion. It seems probable that most trial judges respect the spirit of the rules and attempt to make their directions clear and free of ambiguity; but both experience and the reported cases show that a certain number (increasingly fewer, we venture to believe) do not. We state this without attempting to assess blame upon either the counsel who presents or the judge who signs the later form from which all the confusion arises; the strong state practice to the contrary, the tendency of many attorneys to overlook or neglect details of federal practice, the natural willingness of judges pressed ex parte "to expedite the appeal"—all tend that way; and the only remedy seems to be increased knowledge of a different federal practice consistently applied. But if a trial judge, whether through misunderstanding or carelessness, can pervert the rule's intent in a decision sure to be more extensively reported and publicized than the mere complying rulings, the resulting patchwork will make it difficult to know just when, in appellate eyes, a litigant has a judgment.

We regret that our brothers have not given us the benefit of their views on these practical aspects of the problem, particularly as we had read their earlier cases as in accord with our views. In addition to this problem we have just stated of varying applications of what seem to us rather clear directions from the rule makers, we suggest two considerations of the utmost practical importance. One is that in

these days of unusual public interest in and criticism of the law's delays we can think of nothing more deserving of criticism than so bootless a delay as that of the two months here involved (or the substantially longer periods perhaps even more usual) while winning counsel are formally verbalizing a result already reached and announced. And the other is that in practice the delaying rule results in the court yielding to counsel its own culminating responsibility for the fashioning of the ultimate judgment and accepting the normal excess of detail supplied by zealous advocates in their natural desire to press home all conceivable ad hoc advantages from the judgment. The only reason we have noted in support of such a rule (beyond counsel's impermissible desire to control the judgment) is that it may follow a perhaps more familiar state practice and thus avoid loss of appellate rights through inadvertence. But even if it be assumed that appellate rules should be adjusted to accommodate carelessness, at cost of the serious losses in effective court procedure noted above, the result thus desired will not be achieved except spasmodically and hence in a discriminatory fashion. For the local procedures in various areas of even a single circuit are too great to permit of devising a rule familiar to all, and thus desirable federal expedition and uniformity may be easily sacrificed without real gain. We still feel, therefore, that the rule planned by the Advisory Committee and adopted by the Supreme Court states the orderly course which we should require. The "just, speedy, and inexpensive determination of every action," F. R. 1, is not to be achieved if courts abdicate to counsel the responsibility for advancing the action to its ultimate conclusion.

To make not wholly fruitless the earnest presentation on the merits by counsel, perhaps somewhat decoyed by defendant's submission of the formal judgment, we say that examination of Judge Foley's careful analysis of the law and relevant decisions, state and federal, discloses no sound basis for upsetting his conclusions. Plaintiff's claim seems doomed to fail in any event.

Appeal dismissed.

U. S. GOVERNMENT PRINTING OFFICE 1957

No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
JOHN N. STULL,
Acting Assistant Attorney General,
ROGER FISHER,
Assistant to the Solicitor General,
I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys,
Department of Justice, Washington 25, D. C.

judgment he must indicate that fact by some suc
language as "and I hereby render judgment for th
plaintiff against the defendant in the sum of $5(
plus costs."

Even where the intent is clear, a mere expression
views is not a judgment; it must be a judicial con
mand of sufficient precision to be carried out. Firs
it must be in operative or mandatory language suc
is: "It is ordered * * *", or "It is hereby adjudge
* * *". Second, a judgment must contain the mi
imum data as to what is the order of the court. Th
Rules require that the notation of a judgment in th
civil docket contain the "substance" of the judgmer
The judgment itself, we submit, must also contain th
substance of the judgment. It should at least indica
the successful party and the amount of the jud
ment—who is to pay what to whom.

II

A. Even if the opinion of the district judge
April 14th were found to constitute a "judgment
there was no *entry* of judgment until May 24th. Th
time for appeal runs from the entry of judgmer
which requires a notation of the substance of the jud
ment in the civil docket. Rule 79 (a) provides th
the docket show the "nature" of all papers filed a
in addition show the "substance" of each judgmer

Under Rule 58 judgment is not effective before su
entry. It thus appears that under the Rules t
docket must both show the fact that the court's acti
is a judgment, and also show its substance. The opi

INDEX

ions of other courts of appeals agree that to fulfill this requirement a notation must identify the action by the use of the word "judgment" (or a comparable term) and at least indicate the name of the successful party.

B. The notation on April 14th was inadequate to meet the requirements of Rule 79 (a). The clerk's entry on that day was:

> Decision rendered on motion for summary judgment. Motion granted. See opinion on file.

This entry did not identify the court action as the judgment of the court—it did not show its "nature". Also it failed to show the substance of a judgment. There was no way of telling from the docket entries which party had filed the motion for summary judgment; no way of knowing which party had won the case. There was also no indication of the amount, if any, of the judgment. The total inadequacy of the April 14th notation as an entry of judgment is demonstrated by the entry on May 24th, the day on which we contend judgment was entered:

> Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.

The April 14th notation, having failed to indicate that the court action was a judgment, did not show its "nature" and, having failed to include the elements contained in the later notation, did not show its "substance". There was therefore no entry of judgment until May 24th.

ARGUMENT

Under the Federal Rules of Civil Procedure, the time for appeal begins to run from the entry of a judgment in the civil docket by the clerk. In contending that the appeal below was timely, it is our position that there was no entry of judgment on April 14, 1955, but rather that judgment was entered on May 24th, 1955. Our argument embraces two main propositions: first, that the opinion of the district judge in April did not constitute a "judgment," and second, that even if it did, the notation of the clerk at that time did not constitute an "entry" of a judgment. Under the Rules a judgment is not effective before such entry.

I

THE OPINION OF THE DISTRICT JUDGE ON APRIL 14TH WAS NOT A "JUDGMENT"

On April 14, 1955, the district judge issued a written opinion in this case on the merits. He quoted and relied upon the opinion of Judge Leibell in *United States* v. *National Sugar Refining Co.*, 113 F. Supp. 157 (S. D. N. Y.). The last sentence of the opinion was set off as a separate paragraph and read (R. 4):

> I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted.

The first sentence of the opinion, two pages earlier, had stated that the plaintiff had moved for summary judgment. The Court of Appeals has held that this opinion of the district court constituted its "judgment" within the meaning of the Federal Rules of

CITATIONS

Cases:

Civil Procedure? We respectfully submit that it did not.

A. THE HISTORY AND CONSTRUCTION OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOW THAT A JUDGMENT WAS CONSIDERED A SEPARATE ACT OF THE COURT FOLLOWING A DECISION

Rule 73 of the Federal Rules of Civil Procedure, *supra*, p. 3, provides that, in cases in which the United States is a party, the time for taking an appeal from a decision of a district court shall be 60 days "from the entry of the judgment appealed from". Aside from this Rule which sets the time limit, there are three Rules with which we are particularly concerned. The first of these is Rule 54 (a), *supra*, p. 2, which gives the only definition of "judgment" in the Rules. The second, and more important, is Rule 58, *supra*, pp. 2–3, which contains the basic provisions as to when a judgment shall be entered. The third is Rule 79, *supra*, pp. 3–5, providing what records of a judgment shall be made by the clerk. These three rules may be considered as providing *what* is a judgment, *when* it shall be entered, and *what* shall be entered. Obviously there is a close interrelationship among the rules; each sheds light on the others.

1. Rule 54 (a) indicates that the judgment is something separate which contains certain elements

The only definition of "judgment" contained in the Rules is that appearing in Rule 54, entitled "Judgments; Costs," the first paragraph of which reads as follows:

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* "* * * these rules contemplate some decisive and complete act of adjudication by the district judge; when this is done, and notation thereof made in the civil docket, the judgment is complete * * *" (R. 12).

Cases—Continued

(a) definition; form.

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 54 (a) supports the proposition that a judgment is a matter of form as well as a matter of substance.

Because of the union of law and equity carried out in the rules, it was considered advisable by the Advisory Committee on Rules for Civil Procedure to have the one term "judgment" include the former "judgment" at law and "decree" in equity. The second sentence of Rule 54 (a) was originally included in Rule 63 of the Preliminary Draft of the Rules of May 1936, and was entitled "Form of Judgments." The Committee's notes state that this provision "is substantially taken from Equity Rule 71 (Form of Decree)."

Rule 71 of the Federal Equity Rules, adopted on November 4, 1912, and Form No. 25 of the Forms of Practice issued under the Equity Rules, contemplated that an effective decree would be embodied in a formal document. Rule 71 was as follows:

> In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon,

Cases—Continued

Statutes—Continued

upon consideration thereof, it was ordered, adjudged and decreed as follows, viz." (Here insert the decree or order.)[1]

The decisions which interpreted Equity Rule 71 distinguish between the court's decree and its findings of fact and conclusions of law, and held that the findings and conclusions did not constitute the decree. *Larkin Packer Co.* v. *Hinderliter Tool Co.*, 60 F. 2d 491, 494–495 (C. A. 10); *Lewis* v. *Ingram*, 57 F. 2d 463, 466 (C. A. 10); *Elliott Addressing Mach. Co.* v. *Addressing Typewriter Stencil Corp.*, 31 F. 2d 282 (C. A. 2); *United States* v. *Goldstein*, 271 Fed. 838, 844–845 (C. A. 8); *Linde Air Products Co.* v. *Morse Dry Dock & Repair Co.*, 246 Fed. 834, 836 (C. A. 2).[2]

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[1] Initially, the Equity Rules, promulgated February Term, 1822, did not provide for a form of decree, but Rule XXXIII prescribed as follows:

> In all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.

On March 2, 1842, provisions relating to the form of the decree and similar to these later contained in Equity Rule 71, were first promulgated in Equity Rule LXXXVI. These provisions were continued in Rule 86 of the Equity Rules, 1866–1911, and in Equity Rule 71.

[2] Cf. *Putnam* v. *Day*, 22 Wall. 60, 67, and *M'Claskey* v. *Barr*, 48 Fed. 130, 131 (C. C. S. D. Ohio), in which it was held that the Equity Rules, before Equity Rule 70½ was promulgated providing for the separate statement of findings of fact and conclusions of law, did not prohibit the recital of facts and law in the decree. In *Putnam* v. *Day*, *supra*, this Court stated as follows (p. 67):

> The eighty-sixth rule in equity, adopted by this court, has abolished the recital of the pleadings and proceedings in the decree, and has prescribed the form in which it shall be couched, as follows: "This cause came on to be heard

Miscellaneous—Continued

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 8–16) is reported at 236 F. 2d 889. The opinion of the District Court (R. 2–4) is reported at 130 F. Supp. 322.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1956. (R. 17.) On November 30, 1956, the time within which to file a petition for a writ of certiorari was extended, by an order of Mr. Justice Harlan, to February 9, 1957. The petition for a writ of certiorari was filed on February 8, 1957, and was granted on March 25, 1957. (R. 18.) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Whether, under the Federal Rules of Civil Procedure, the time for appeal runs from the date of an opinion (and docket entry) indicating that the case has been decided, or from the date of signature by the judge (and corresponding docket entry) of a formal judgment indicating the successful party and the amount of the judgment.

RULES INVOLVED

Federal Rules of Civil Procedure:

Rule 54. JUDGMENTS; COSTS.

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

* * * * *

Rule 58 [As amended December 27, 1946].
ENTRY OF JUDGMENT.

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the

form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73 [As amended December 27, 1946, and December 29, 1948]. APPEAL TO A COURT OF APPEALS.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

A party may appeal from a judgment by filing with the district court a notice of appeal. * * *

* * * * *

Rule 79 [As amended December 27, 1946, and December 29, 1948]. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) *Civil Docket.* The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of

The second sentence of Rule 54 (a), which states that a judgment "shall not contain" three particular items, certainly implies that there are some elements which a judgment *shall* contain. The very heading of the Rule, "Definition; Form," suggests that a judgment must have some form. Under the equity procedure there was a form prescribed by the rules. The Advisory Committee, as indicated in its notes, intended to carry this provision forward in substance. The requirements as to form were made more flexible, but under Rule 54 (a) a judgment remains a separate judicial act which contains certain elements and has a form and identity of its own.

2. Rule 58 contemplates that the judgment be a direction of the court, not merely a decision

Rule 58, *supra*, pp. 2–3, by providing *when* a judgment shall be entered, sheds substantial light on what the Rules consider to be a judgment. Judgment upon the verdict of a jury is to be entered forthwith unless the court otherwise directs. Here the act is ministerial and the Rule provides that the clerk shall act for the court in entering judgment unless told not to. (There are two other instances in which the clerk is similarly authorized: Rule 55 (b) (1), judgment by default for a fixed amount, and Rule 68, where an

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at this term, and was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed, as follows, viz:" here inserting the decree or order. The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific.

the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

* * * * *

(b) *Civil Judgments and Orders.* The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

offer of consent judgment has been accepted.) Otherwise, there is to be no entry of judgment until there has been a "direction" of the court.

The second sentence of Rule 58, as originally adopted in 1938, read:

> When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.

When the 1946 amendments were adopted, the quoted sentence was changed as follows, the stricken words being omitted and the italicized words being added:

> When the court directs ~~the entry of a judgment~~ that a party recover only money or costs or that ~~there be no recovery~~ *all relief be denied,* the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.

In addition, a new sentence was added at the end of the rule, reading:

> The entry of the judgment shall not be delayed for the taxing of costs.

In its note explaining these amendments the Advisory Committee refers only to "*Two* changes * * * made in Rule 58 in order to clarify the practice"

(c) *Indices; Calendars.* Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. * * *

* * * * * *

STATEMENT

The facts are not in dispute and may be summarized as follows:

Taxpayer sued to recover the amount of documentary stamp taxes which it alleged the Government had illegally assessed and collected, and in its complaint demanded judgment against defendant in the sum of $7,189.57, interest and costs. Upon joinder of issue, taxpayer moved for summary judgment. (R. 7.) On April 14, 1955, the District Judge rendered an opinion which quoted and relied upon Judge Leibell's opinion in *United States* v. *National Sugar Refining Co.*, 113 F. Supp. 157 (S. D. N. Y.), and concluded with the statement (R. 4) "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." On the same day the clerk made the following docket entry (R. 2):

> April 14 Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.

On May 24, 1955, the District Judge signed a paper, submitted by taxpayer, captioned "Judgment" which recited that, taxpayer having moved for summary judgment, the motion having come on to be heard on February 23, 1955, and (R. 4–5) "after due considera-

(Report of Proposed Amendments to Rules of Civil Procedure for the District Courts (June 1946), p. 76). (Emphasis added.) The two changes are stated to be "The substitution of the more inclusive phrase 'all relief be denied' for the words 'there be no recovery'." and "The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs." Thus, the inference is plain that the Advisory Committee did not regard the omission of the words "the entry of a judgment" as a change of any substance. At the most, the change simply eliminated the necessity of the court's directing the clerk to enter the judgment, so long as the court had directed that a party recover money. One direction by the court was enough.

It is important to note that the Rule does not say that the clerk shall enter judgment once the court has *decided* that a party shall recover money damages. Judgment is not to be entered until the court has *directed* the recovery. The Rule maintains the distinction between a decision of a court and an order of a court.

There are thus three categories of occasions on which judgment may be entered. On a general verdict of a jury the clerk may enter judgment for the court without further action by the judge. Where simple money damages are involved, the clerk may enter judgment once the court has *directed* that a party recover a specified amount. Where more complicated relief is involved, judgment may not be entered until the court has approved the form of judgment and di-

tion the plaintiff's motion for summary judgment having been granted on April 14, 1955, and the Court's opinion having been duly filed herein," provided as follows:

> IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, the F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor.

This document was stamped: "Judgment Rendered: Dated: May 24th, 1955. Percy G. B. Gilkes, Clerk." (R. 5.) On that day the clerk made the following entry in his docket (R. 2):

> May 24 Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7,189.57 with interest of $542.80 together with costs $37 amounting in all to $7,769.37. Bill of Costs attached to judgment.

The Government filed its notice of appeal on July 21, 1955 (R. 5), which was ninety-eight days from the original grant of the motion and fifty-eight days from the filing of the judgment signed by the judge. Taxpayer moved the Court of Appeals to dismiss the appeal as not timely brought. (R. 6.) The Court of Appeals, upon consideration by the full court *en banc*, granted the motion and dismissed the appeal. (R. 17.)

rected its entry. We are here concerned with a case of money damages. Since judgment cannot be entered until the court has directed that a party recover, it would appear that under Rule 58 such a direction is the judgment of the court.

The Report of Proposed Amendments to Rules of Civil Procedure for the District Courts (October 1955) supports the view that the judgment of the court is a separate judicial act following the decision of the court. The Report contained a suggested form of judgment to be used by clerks when the court directs recovery of only money or costs or that all relief be denied (note, p. 69; Form 31, p. 70). Further, the Report proposed an amendment to Rule 58, considered as declaratory of existing law, which would have inserted the following between the present second and third sentences:

> If an opinion or memorandum is filed, it will be sufficient if a *specific direction* as to the judgment to be entered is included therein or appended thereto; and any such direction either for an immediate or for a delayed entry of judgment is controlling and shall be followed by the clerk. [Emphasis added.] [3]

The Committee thus understood that under Rule 58 there was no judgment until the court had made a specific direction.

[3] The Advisory Committee's explanatory note states (p. 60) that the amendment—

> should set to rest the doubts noted in Comm., *Entry of Judgment*, 18 Fed. Rules Serv. 927, due to certain cases there cited—and see also 3 *Barron & Holtzoff, Fed. Prac. & Proc.* § 1283, p. 220 (1950)—as to the effect of the court's direction as an entry of judgment.

SUMMARY OF ARGUMENT

I

The appeal from the district court to the court of appeals was in time because taken within 60 days of the formal entry of judgment on May 24, 1955. The opinion of the district judge on April 14th did not constitute the "judgment" of the court.

A. The relevant rules of the Federal Rules of Civil Procedure indicate that a judgment is a distinct and separate act of a court following a decision. Rule 54 (a) is derived from the old equity rules which provided a special form for a decree. And in stating that a judgment "shall not contain a recital of pleadings" etc., Rule 54 (a) clearly implies that there shall be an identifiable order of the court called a judgment which shall contain at least some minimal elements.

Rule 58 provides that the clerk shall enter judgment for a money amount after "the court directs that a party recover only money or costs * * *." The clerk is not to enter judgment following a *decision* by the court but only following a *direction* that a party recover a money amount. We believe that this rule maintains the basic distinction between an opinion of a court and an order of a court, and it is only the order of the court—a direction by the court—that constitutes a judgment.

Rule 79 supports the view that a judgment is a separate order of the court complete in itself and distinct from the opinion. Under Rule 79 (a) the clerk must enter the "substance" of a judgment in the civil docket. For this to be possible there must exist a judgment which is more than a phrase—a judgment

3. Rule 79 supports the view that a judgment is a separate, tangible order of the court complete in itself and distinct from an opinion

Rule 79 (b), *supra*, p. 4, requires the clerk to keep "a correct copy of every final judgment" affecting a lien upon real or personal property. This plainly suggests that a judgment is a separate document setting forth the order of the court. The clerk could hardly keep a "correct copy" of a judgment unless there existed language embodying the court order. A copy of the judgment would serve little purpose if it merely said "the plaintiff's motion is granted." And it is clear that the clerk is not expected to file a copy of the opinion as the judgment. Rule 79 provides further demonstration that under the Federal Rules of Civil Procedure a judgment is not merely the decision of the court but a separate and distinct order of the court sufficiently complete that a copy of it is meaningful in itself.

B. THE MOST SATISFACTORY METHOD OF RENDERING JUDGMENT IS FOR THE COURT TO SIGN A FORMAL DOCUMENT

1. Formal judgments have long been the general practice

As the Court well knows, the usual judicial practice following decision in a case is for the court to render judgment in formal terms. Typically, this is done by having a judge sign a document headed "Judgment", which briefly recites that the case has been heard or submitted and then contains the operative language of the court's order. The document signed by the district judge below on May 24, 1955 (R. 4–5) is illustrative. The formal judgment contains the basic elements of the court's order. It contains the com-

which has substance. Similarly, Rule 79 (b) requires the clerk to keep "a correct copy of every final judgment" affecting a lien on real or personal property. This plainly suggests that a judgment is a separate and distinct document embodying the order of the court.

B. The most satisfactory method of rendering judgment is for the court to issue a formal document clearly identified as the judgment of the court. This has long been the general practice. It is the practice followed by this Court and by all of the courts of appeals. The Second Circuit itself, following this Court's decision in *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, issues a formal judgment separate and distinct from its opinion. In this very case, following an opinion at least as explicit as that of the district court, the court of appeals rendered formal judgment.

Wherever, as here, a formal judgment has been signed, that document should, at least presumptively, be taken as the judgment of the court. The court below has apparently adopted a reverse presumption to the effect that an informal decision by a court will be taken as the judgment unless the court affirmatively indicates to the contrary. In *United States* v. *Hark*, 320 U. S. 531, 534–535, this Court said:

> Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry.

This rule has been followed by most of the courts of appeals. We believe that it is the correct rule and should be applied here.

mand or direction of the court: "It is ordered, adjudged and decreed that * * *." It contains the names of the parties; and it states who shall pay how much to whom.

The practice of having an independent document labeled "Judgment" is the one followed by this Court. No matter how explicit the opinion, a separate form is promptly typed up embodying the judgment of the Court, usually initialled by the Justice who announced the judgment and opinion of the Court, and filed. It is certified copies of this original judgment that are sent to the court or parties concerned. See Revised Rules of the Supreme Court, Rule 59 (3).

The Rules of this Court assume that the opinions and judgments of other courts will be embodied in separate documents. Rule 23 (i) provides that there shall be appended to a petition for certiorari a copy of any opinions delivered upon the rendering of the judgment sought to be reviewed. Rule 23 (j) provides that "there shall also be appended to the petition a copy of the judgment or decree in question."

The Courts of Appeals, without exception we believe, now follow a similar procedure. Following a decision of the court a formal judgment is prepared, and signed or initialled by one of the judges. In apparently a majority of cases this is done on the same day as the opinion is issued. Sometimes, for example where there may be some difficulty in phrasing the judgment, it may be rendered a day or two later. On occasion, formal judgment may be rendered as much as a few weeks later.[4] But every Court of Ap-

[4] For example in *National Labor Relations Board* v. *Business Machine Conference Board*, 228 F. 2d 553, certiorari denied,

Practical considerations also favor the use of formal judgments. The use of such a judgment need not cause the delay feared by the Second Circuit. Delay stems not from the use of a formal judgment but from the practice of waiting for counsel to prepare the form, and imposing no limit on when it should be submitted. This can be easily avoided, or the clerk can prepare the form. On the other hand, failure to embody the judgment in a formal document causes confusion among the litigants and third parties interested in the judgment. The Second Circuit itself has had difficulty in applying its construction of the Rules, sometimes finding that the judge's language elsewhere in the record indicates an intent to do more, thus turning a categorical "complaint dismissed" into less than a judgment. The great variety of possible judicial expressions demonstrates the desirability of a sharp and clean-cut judgment. Recording and enforcement of liens and the execution of the judgment itself depend upon precision in terms and knowledge that a judgment has in fact been rendered.

C. Although we concede that it is possible under the present Rules to render judgment through means other than a formal document, to do so requires both judicial intent to render judgment and the use of appropriate language. A district judge can render judgment orally from the bench or can do so in an opinion, but he must manifest a clear intent that that is what he is doing. The language should be unequivocal. Since a decision and a judgment are two different judicial acts, it is not enough for a judge to say "the motion is granted". If he intends to render

peals, treats the rendering of judgment as a distinct judicial act from the decision or opinion in the case, no matter what language the opinion may use.

Illustrative is the action of the Second Circuit in this very case. The court found that the opinion of the district judge concluding " * * * the plaintiff's motion is granted" was a "complete act of adjudication" and that the judgment was complete without other formal documents. (R. 12.) The Court of Appeals' own opinion concluded (R. 16):

> Accordingly the appeal must be dismissed as not timely filed.
>
> Motion to dismiss granted; appeal dismissed.

Yet the Court of Appeals did not treat its own opinion, substantially more explicit than that of the district court, as a complete act of adjudication making other formal orders unnecessary. On the contrary, the court proceeded to render a formal judgment (R. 17) which stated that—

> * * * it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

In the district courts the practice of having a formal judgment in every case is not universal. However, in the district court for the District of Columbia, which has 17 judges and is one of the two busiest district courts in the country, it is the practice to have the judgment in every case embodied in a formal

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351 U. S. 962, the Second Circuit's opinion of December 22, 1955, concluded: "Enforcement of the Board's order is therefore in all respects denied." On January 12, 1956 the court entered a formal decree which provided that the Board's order "hereby is denied and set aside."

document. There, in the case of money judgments where there has been no jury, the almost universal rule is for counsel for the prevailing party to prepare the formal judgment which is then submitted to the judge for his signature. In a rare case, at the direction of the judge, the clerk may prepare the formal judgment for the judge to sign.

2. Where a formal judgment is signed there is a presumption that that is the judgment

We agree with the court below that if a district court has once rendered judgment it cannot, by a subsequent and more formal act, render judgment again and thus extend the time for appeal. But such a statement leaves open the question of whether the first action taken by the court was the rendering of a judgment. In deciding that question the conduct of the court, both in general and in the particular case, is highly relevant. Where the court first decides the case and then enters a formal judgment, the formal action will be taken as the judgment of the court, at least in the absence of some unusual circumstance.

This Court has twice considered the situation of a decision followed by a formal judgment, and each time has found that the formal action constituted the judgment of the court.[4a] *United States* v. *Hark*, 320 U. S. 531, involved the question of which constituted the judgment of a district court for the purpose of computing the time for appeal under the Criminal Appeals Act[5]—an opinion which ended "The motion

[4a] The Court did not reach the issue in *Hoiness* v. *United States*, 335 U. S. 279, 300.

[5] Act of May 9, 1942, c. 295, 56 Stat. 271, Section 1.

to quash is granted" or a subsequent formal order quashing the indictment. In holding that the formal order and not the court's earlier statement in its opinion was the judgment, this Court stated (pp. 534–535):

> Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

In *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 286, in holding that an opinion of the Court of Appeals did not constitute its judgment, this Court pointed out that:

> It does not detract from the "Opinion" as an opinion that in its heading it gives as dates "Argued January 6, 1944. Decided August 8, 1944," and that it concludes with "The order of the Tax Court is reversed." The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all

other circuits judgment orders are separately filed. In spite of its title, the "Order for Mandate" on its face fulfills the function of such a judgment order. It recites that "it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

"It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.
By A. DANIEL FUSARO,
Deputy Clerk."

This language plainly imports that this is the judgment and that it is then being rendered. * * *

In recent cases several Courts of Appeals have applied the principles thus laid down by this Court to determine whether an earlier statement by a district court or the later express judgment constituted the "judgment." The First Circuit in *United States* v. *Higginson*, 238 F. 2d 439, 442, held that the opinion of the district judge, which concluded "and accordingly, judgment must be entered for the plaintiffs", was not the judgment. Instead, the formal judgment, as submitted by the plaintiffs for the recovery from the defendant (as here, the United States) of a stated sum with interest, signed at a later date by the judge, was ruled to be the judgment. The First Circuit, relying on this Court's decision in *United States* v. *Hark*, 320 U. S. 531, and on its own prior decision in *In re Forstner Chain Corp.*, 177 F. 2d 572, stated that—

> the Federal Rules do not answer the question which confronts us. The terms "decree", "order" and "direction" have to be judicially defined if the rules are to be meaningful.
>
> * * * * *
>
> Since, in the *Forstner* case, the district judge had refused to grant a formal judgment, it was clear under the local practice that he did not have in contemplation any subsequent judicial act of pronouncing judgment in a more formal manner. But in the instant case, it can be gathered from the language of the formal judgment of February 23, 1956, and from the fact of its rendition and entry that neither the district judge nor the clerk regarded the reference in the opinion nor the first entry as a judgment or entry of judgment. In the judgment of February 23, which the district judge signed, reference is made to the court having on January 6, rendered and filed not a judgment, but "an opinion." [238 F. 2d at 442]

The *Higginson* case, which was decided after the instant case, possesses particular significance since both the Second Circuit and the First Circuit recognized that the *Higginson* decision was in conflict with the decision below.[6] We submit that the *Higginson* case applies the correct rule.

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[6] In the opinion below the court stated that the purpose of Rule 58 was "also advanced" (R. 12) by a local rule, reading—

> A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form.

In *Higginson* the First Circuit, noting the absence of any similar local rule, declared (238 F. 2d at 443): "To the extent

In *Cedar Creek Oil and Gas Co.* v. *Fidelity Gas Co.*, 238 F. 2d 298, the Ninth Circuit also held that, for purposes of computing time for appeal, the formal judgment signed by the judge must be considered as the judgment. In that case the trial judge had issued an opinion, together with findings of fact and conclusions of law which stated that defendant was entitled to prevail and which concluded, "Judgment is hereby Ordered to be entered accordingly." (238 F. 2d at 299.) The clerk's notation recited, among other things, that there had been filed "order for judgment in favor of defendants * * *." The Court of Appeals nevertheless held that the time for appeal started to run later when the formal judgment was signed and entered, and commented (p. 301):

> Under such circumstances it should be permissible to look at what the judge and clerk did later. * * * It should not be presumed or assumed they had an intent to do a useless act. If the first acts are ambiguous, we think the later acts afford circumstantial evidence of the intent in the first acts.

See also *Randall Foundation, Inc.* v. *Riddell* (C. A. 9), decided January 18, 1957 (1957 C. C. H., par. 9352), and *Reynolds* v. *Wade*, 241 F. 2d 208 (C. A. 9).

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that the language of the *Schaefer* opinion might apply even where no such local rule exists, this decision is not in accord with it." Finally, the issue between the two circuits was sharply defined when the Second Circuit in *Matteson* v. *United States*, 240 F. 2d 517, 518, commenting upon the *Higginson* case, explained that "we viewed the local rule as merely corroborative of the practice actually required by F. R. 58" and stated that "Judge Hartigan's opinion must be taken as disapproving our reasoning."

The Fourth Circuit also regards the signing of a formal judgment as being inconsistent with a conclusion that a prior announcement of adjudication was the judgment. In *Papanikolaou* v. *Atlantic Freighters,* 232 F. 2d 663, a memorandum opinion signed and filed by the district judge which stated that the suit was dismissed was held not to be the judgment in view of the fact that the district judge had later signed a "final order" decreeing that the suit be dismissed. Pointing to the fact that "the judge deemed it necessary or desirable to file a formal judgment of dismissal" (232 F. 2d at 665), the court concluded that the parties "were justified in regarding this as the final judgment disposing of the case."

In accordance with the decisions of this Court in *Hark* and *Estate of Bedford,* and the other authorities cited, it is submitted that where, as here, a formal judgment has been rendered that action should be taken as the judgment of the court—at least in the absence of some exceptional circumstance. There is no suggestion of unusual circumstance in this case.

3. Practical considerations favor a formal judgment

The court below suggests that the Rules should be so construed that the opinion of the district judge constituted the judgment of the court in order to avoid "purely useless delays" (R. 14). The court considered the practice which it sanctioned as "a wise and practicable principle materially aiding in the expeditious determination of civil cases" (R. 16). We agree that the Rules must be construed in the light

of such practical considerations but believe that the practice of rendering formal judgments need cause no delay and greatly serves the interests of notice, certainty, and orderly judicial procedure.

As the practice of this Court and the courts of appeals throughout the country demonstrates, there need be no delay between the decision of a case and the rendering of a formal judgment. Formal judgment, particularly in a case involving a known money amount, may be entered on the same day as that on which the case is decided. Such delay as the Second Circuit criticizes comes not from the practice of rendering a formal judgment but rather from the practice of postponing that action until the successful party, at his convenience, presents a judgment to be signed by the judge. There is no necessity for that procedure. If counsel is to prepare the form of judgment he could be required to do so in one or two day's time. Perhaps more simply, as in this Court and the Court of Appeals for the District of Columbia Circuit, the clerk could automatically prepare a formal judgment as soon as the court has decided the case. Such a "judgment will then be signed or initialed by the judge or issued in the name of the court under the attestation of the clerk (whatever is the local practice), and not until then will the clerk make the entry of the judgment in the civil docket in accordance with Rule 79 (a)." *In re Forstner Chain Corp.*, 177 F. 2d 572, 577 (C. A. 1). Through the supervisory powers of this Court and through the Administrative Office of the United States Courts it should be possible to have the dis-

trict courts uniformly and promptly render a formal judgment in each case. The requirement that there be formality to court action is not a requirement that there be "purely useless delays".

Strong practical considerations dictate the desirability of a formal judgment, preferably a document labeled "judgment" and embodying the order of the court. A judgment is an order of the court—a command similar to those for which one may be held in contempt. Whether or not a court has issued a command should not be left in doubt; it should not be left subject to the interpretation of the conclusory language of each oral or written opinion. To appreciate the extent of the practical problem presented by the Second Circuit's interpretation of what constitutes a judgment one must understand the test as that court applies it.

In *Matteson* v. *United States*, 240 F. 2d 517, 518 (C. A. 2),[7] the court stated that "the issue always turns on the trial judge's declared intent as to the judgment" and that "where he has not made that clear, some interpretation is necessary." The court went on to say "we do not think the trial judge's original statement is subject to reassessment and definition" on the basis of having later signed a formal judgment. But consider the application of this rule in a group of cases reported as *Edwards* v. *Doctors Hospital*, 212 F. 2d 888 (C. A. 2).[7a] There, with re-

[7] Without urging the correctness of, but because of, the decision in *Schaefer*, the Government raised the jurisdictional question before the Second Circuit in *Matteson*.

[7a] The single case, *Edwards* v. *Doctors Hospital*, is now pending on petition for certiorari, No. 219, this Term.

spect to some of the cases before it, the court said (242 F. 2d at 891):

> In these consolidated cases Judge Galston filed an opinion on March 28, 1956, 140 F. Supp. 909, which would have been an unequivocal and definite determination of all the issues in favor of defendant, dismissing the complaint, except for the fact that he added "Settle orders."
>
> * * * * *
>
> The ruling in *F. & M. Schaefer Brewing Co.* v. *United States, supra,* followed by *Matteson* v. *United States*, 2 Cir., 240 F. 2d 517 is (236 F. 2d at page 891) that, to start the time to appeal running, there must be "some decisive and complete act of adjudication by the district judge * * * and notation thereof made in the civil docket." Here there was no such decisive act because of the words "Settle orders," at the end of the opinion. This well known formula has always indicated that something further is necessary, in the opinion of the trial judge, before his decision becomes definitive.

Significantly in the cited case the orders which were later settled amounted merely to the affixing by the district judge of his signature to a formal order dismissing each complaint with costs. Thus, had the district court here added at the end of his opinion "Settle order" or "judgment," this would have been regarded even by the court below as adequate to show lack of present intention to render a judgment.

In another one of the cases decided in that group the district judge, at the conclusion of the trial, had said: "I am going to dismiss the complaint." The

docket entry showed: "Complaint dismissed." It could well be thought that this was a judgment within the Second Circuit's interpretation. But that court looked to the opinion which the judge had dictated after stating that he was going to dismiss the complaint. Following some thirteen pages in the transcript the trial judge had said, "if you want to submit more formal requests and findings, I will be glad to receive them." Nothing was submitted. Five weeks later a formal judgment was entered dismissing the complaint, action which the Court of Appeals found to constitute the judgment in the case. Under this holding the whole transcript may have to be reviewed to discover whether or not a judgment has been entered. A judge might during the trial indicate that he would be willing to enter a formal judgment or findings for the successful party should it wish to submit them, and apparently such a manifestation of intent would control, even though the docket entry made no reference to such a statement.

There is an unlimited choice of conclusory words which may be used in a written or oral opinion or other judicial pronouncement. Many would appear to constitute a judgment within the eyes of the Second Circuit but are highly ambiguous as to whether the district court contemplates further action. A few examples may be given: "judgment will be for the plaintiff"; "the decision must be for the plaintiff"; "I am going to dismiss the complaint"; "I find for the defendant"; "the defendants are entitled to judgment". Frequently, even where the language may appear to be dispositive, there will be problems in-

herent in the case which will require further action by the court. In many instances, even though the legal issues have been adjudicated, extensive and complicated computations may have to be made. Occasionally, in tax cases and other cases involving offsetting amounts, the computation may be necessary before it is known who owes money to whom. Often, a decision as to whether or not to appeal cannot reasonably be made until the court files its findings of fact.

Among the great variety of judicial expressions which may or may not constitute a judgment under the Rules as interpreted by the ~~Supreme~~ Circuit, both the clerk and the parties must decide in each instance whether judgment has been rendered. The entry of judgment by the clerk is a ministerial function; but the effect of the decision below places upon him a duty to decide from something less than an express adjudication that final judgment is intended. Since the failure of the clerk to enter judgment is said (R. 12, fn. 2) to be a "misprision" "not to be excused", the imposition of such a burden in circumstances so ambiguous seems not to represent the intent of the Rules. It also requires the clerk to exercise a discretion which under the Rules should be exercised by the judge.

But the clerk's interpretation of the judge's intent provides no protection to counsel. In this case it is obvious from the docket entries that the clerk understood that no judgment had been rendered until the formal judgment was signed. Yet the Court of Appeals held that, despite the understanding of everybody involved—the district judge, who signed the

formal judgment, the clerk who stamped it "Judgment Rendered", the plaintiff who prepared and submitted it, and the defendant, who computed appeal time from it—judgment actually had been entered unwittingly by the clerk a month previously.

Under the Second Circuit rule the only cautious course for counsel is to file a notice of appeal following any indication of views by the district judge. The resulting premature[8] and duplicate appeals may be burdensome to the courts but they seem to be the only alternative to finding out later that an appeal has been filed too late. The United States now, in many cases, files two notices of appeal to make sure that one is timely. But the practical problem is by no means limited to the question of appeal time.

Other persons have an interest in a precise statement of the judgment and the notation of its entry apart from the litigants. Creditors of the party against whom a money judgment is entered are concerned both with the time when a judgment lien attaches and with the amount of the judgment.

28 U. S. C. (1952 ed.), Section 1962 provides:

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[8] See, *e. g.*, the unreported decision referred to in *Edwards* v. *Doctors Hospital*, 242 F. 2d 888, 891 (C. A. 2):

> Such was the holding in *United States* v. *Lucchese*, decided without opinion by this Court on October 8, 1956. In that case Judge Inch, 149 F. Supp. 952, indicated in his opinion that he would grant a motion for summary judgment dismissing the complaint, without prejudice to the institution of another proceeding; but his opinion ended with the words, "Settle order." This Court, in a panel consisting of Judges Clark, Hand and Swan, held that the appeal was prematurely taken and should be dismissed, as no order was ever settled. * * *

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. * * *

The statutes of most states also provide for the registration, recording, docketing and indexing of district court judgments in the same manner as for state court judgments. In some states a correct or certified copy of the judgment of the district court must be filed in the state office before a lien attaches. In other states an abstract of the district court's judgment may be filed, but in such instances the abstract must include prescribed information, such as the names, addresses and counsel for the prevailing party and the judgment debtor, the amount of the judgment, the date when the judgment was entered, etc.[9]

Precision in the judgment is also essential to its

[9] *E. g.*, 4 Arizona Revised Statutes Annotated (1956), c. 9; Deering's California Code of Civil Procedure (1953), Section 674; 6 Delaware Code Annotated (1953), Sections 4704, 4731 and 4736; 2 Burns Indiana Statutes Annotated (1946), Part 1, Sections 2–2517, 2–2520, 2–2710 and 2–3302; General Statutes of Kansas Annotated (1949), Sections 60–3122 and 60–3126; 25 Minnesota Statutes Annotated (1947), Sections 548.09 and 548.11; 2 Mississippi Code 1942 Annotated (Recompiled, 1957), Sections 1554, 1555 and 1557; 32 Vernon's Annotated Missouri Statutes (1952), Sections 511.350, 511.440, 511.450 and 511.500; 7 Revised Codes Montana (1947), Sections 93–5708, 93–5709, 93–5712 and 93–5714; 2 Revised Statutes Nebraska 1943, Sections 25–1303 and 25–1305; 4 Gilbert-Bliss New York Civil Practice Act Annotated (1943), Sections 500, 502, 502–a, 503, 504, 509 and 510.

enforcement by execution and other proceedings supplementary to judgment, since Rule 69 (a) prescribes that these shall be in accordance with the practice and procedure of the state in which a district court is held.[9a] Knowledge that there has been an adjudication of the case is hardly enough to enable a litigant to obtain a transcript of judgment which sets forth all the required information for recording elsewhere and for process in enforcement of the judgment. The court below suggests that "the precise details" can be located "when needed by the clerk to prepare a formalized judgment file" (R. 13). But a judgment is an operative order of the court which, in practical terms, is not an order until the basic details are collected together and stated in usable form. It is not an order until it is certain. The requirements of Rules 58 and 79 (a) that a judgment to be effective must be entered as such and its substance noted on the civil docket were surely means intended to promote the requisite certainty. It is submitted that the decision below reads this provision out of the Rules, with the untoward result which the present case illustrates.

C. ALTHOUGH A JUDGMENT NEED NOT BE FORMAL, THE RENDERING OF A JUDGEMENT REQUIRES JUDICIAL INTENT TO DO SO AND THE USE OF APPROPRIATE LANGUAGE.

Although arguing above (*supra*, pp. 20–35) that the best procedure is to have a formal document labeled "judgment" entered in each case, we do not contend that that is the only way in which a district

[9a] In a condemnation case the judgment is itself the title instrument and must be sufficiently precise to be recorded as such.

court can render judgment under the present Rules. We believe that that is the best way, that there is a presumption that that is the method in which judgment will be rendered, and that where there has been a formal judgment that should be taken as the judgment of the court (except in extraordinary cases). We further contend that less formal action by a court cannot constitute a judgment unless it is made unmistakably clear that it is intended to, and unless it contains the basic elements of a judgment.

1. A judicial expression is not a judgment unless the court manifests an intent that it be the judgment in the case

The court below agrees that the intention of the district judge is important. But it appears to hold that if the judge once indicates that he has arrived at a decision that indication constitutes, *ipso facto*, the judgment of the court unless he shows a contrary intent. As discussed above, we believe that there is a critical distinction between a decision and a direction or command of the court. A judgment is a judicial command. An expression of views by a court should not be considered a judgment unless the court clearly indicates that that is its intent.

The First Circuit gives a lucid discussion of the problem of intent in its opinion in *In re Forstner Chain Corp.*, 177 F. 2d 572, 576–577:

> As stated in *Commissioner of Internal Revenue* v. *Bedford's Estate*, 1945, 325 U. S. 283, 286, 65 S. Ct. 1157, 89 L. Ed. 1611: "A judgment 'is the act of the court', *Ex parte Morgan*, 114 U. S. 174, 175, 5 S. Ct. 825, 29 L. Ed. 135, even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions." A final judgment is

the concluding judicial act or pronouncement of the court disposing of the matter before it. But neither by statute nor by rule is there a requirement that judgment be pronounced in any particular way, or embodied in written form in a separate formal document entitled "Judgment". See *United States* v. *Hark*, 1944, 320 U. S. 531, 534, 64 S. Ct. 359, 88 L. Ed. 290. Whether such a judgment has been rendered depends primarily upon the intention of the court, as gathered from the record as a whole, illumined perhaps by local rule or practice. *Commissioner of Internal Revenue* v. *Bedford's Estate, supra.*

A judgment may be pronounced orally from the bench. Thus if the judge should say, "It is the judgment of the court that the complaint in this case be dismissed", that statement may be meant as the final judicial act, the rendition of judgment: and when the clerk, pursuant to ad hoc or standing instructions, later notes such judgment, or the substance of it, in the civil docket, the time for taking an appeal commences to run. An opinion is not itself a judgment, even though it contains conclusions of fact or of law, and foreshadows how the judge intends to dispose of the case. Not infrequently, however, there is tacked on at the end of an opinion a sentence in mandatory language such as: "The complaint is dismissed." In the understanding and practice of the particular court, this concluding sentence may be the final judgment, the concluding judicial act or pronouncement disposing of the case, to be entered by the clerk forthwith. But not necessarily so. See *Commissioner of Inter-*

> *nal Revenue* v. *Bedford's Estate, supra,* 325 U. S. at page 286, 65 S. Ct. at page 1158. If it is the practice of the court to pronounce judgment in a more formal manner, in a separate document entitled "'Judgment", then the concluding sentence at the end of the opinion amounts to no more than a direction to the clerk for the preparation of the final judgment on behalf of the court; the formal judgment will then be signed or initialed by the judge or issued in the name of the court under the attestation of the clerk (whatever is the local practice), and not until then will the clerk make the entry of the judgment in the civil docket in accordance with Rule 79 (a).

The courts of appeals have had a difficult time deducing the intent of a district judge from language appended to an opinion. We summarize in the Appendix, *infra,* p. 53, some of the many cases dealing with the problem. They illustrate the great variety of possible conclusory phrases and some difference of views as to what sort of language indicates an intent to render judgment. We suggest that a strict rule should be adopted. In view of the desirability of formal judgments, dubious and indefinite language announced from the bench or included in an opinion should not be considered as the judgment of the court. Where the judge's intent is unmistakable, then, of course, an oral announcement or a written opinion may be taken as the judgment of the court, but not otherwise. It is easy enough for the district judge to use some such phrase as "* * * and I hereby render judgment for the plaintiff against the defendant

in the sum of $500 plus costs." It is not enough that the judge say "motion granted" or indicate how he is deciding the case. Language of the court does not constitute a judicial judgment unless on its face it indicates that the court does not intend to follow the normal practice of rendering formal judgment but intends these very words to constitute the final order of the court.

It is submitted that the court below should have recognized that it was the intention of the district court not to make its judgment prior to its rendition in express form. The statement at the end of its opinion set forth the conclusion which the district court reached as a result of the reasoning contained in the opinion; it was a decision, not an order of the court. As pointed out above, neither did the clerk regard the decision rendered on the motion for summary judgment to be the judgment, since it was not until the formal judgment was signed that the clerk made an entry that judgment had been filed. The parties did not understand that judgment had been entered prior to May 24, 1955, for it was taxpayer who submitted the form of judgment and the Government computed its time to appeal from the entry of this professed judgment. Moreover, this document intrinsically indicates that the district court did not understand that prior proceedings had amounted to adjudication, for in its recitals they are described as the granting of a motion and the filing of an opinion. (R. 4.) And it should not be assumed that the district judge would have signed a formal judgment

if he had intended his opinion to be the judgment of the court.[10]

2. For a court's informal expression to be a judgment it must be a judicial command and be of sufficient precision to be carried out

The intent of a judge to render judgment, even where that intent may be clear, is not enough; judgment itself must be rendered. The court, either through the judge or through the clerk, must embody the various elements that make up a judgment into words and issue those words as the command of the court. Even if a judge intended to dispose of a case by saying "I am persuaded by the plaintiff's arguments", such a pronouncement from the bench would not be a judgment. Upon a review of the cases and practice in the federal courts we believe that there are certain minimal elements which must be included in a judicial pronouncement in order for it to be a judgment.

[10] Local rules indicate recognition of a practice of entering formal judgments. Thus, Rule 10 (a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York permits the court to make an order on a motion either originally or on application for resettlement, in an extended form; Rule 12 treats of the form of orders, judgments and decrees; and Rule 13 provides for their submission and settlement. New York State procedure contemplates the rendition of judgments in precise form. 3 B Gilbert-Bliss, New York Civil Practice Act (1942), Sec. 440; 4 Gilbert-Bliss, New York Civil Practice Act (1943), secs. 472, 501, 608 and 612; 10A Gilbert-Bliss, New York Rules of Civil Practice (1955), Rule 70; 10B Gilbert-Bliss, New York Rules of Civil Practice (1955), Rules 185, 195, 196, 198, 201.

First, it must be expressed in operative language. Typical may be considered phrases that are used in the judgments of this Court: "It is now here ordered and adjudged by this Court that * * *"; "On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said ------ Court in this cause be, and the same is hereby * * *" Although such formality may not be necessary the words must connote a present command, not future action. Phrases which would meet this test might be: "It is ordered that * * *"; "It is adjudged that * * *"; "I hereby render judgment for * * *" Non-operative language such as "The plaintiff must prevail"; and "The defendant's motion will have to be granted" cannot, we submit, constitute the judgment of a court.

Not only must a judgment be a command of a court but it must be sufficiently specific so that it can be carried out. As we discuss below, *infra,* pp. 44–47, the notation of a judgment in the civil docket must contain the "substance" of a judgment. We believe that a judgment itself must also contain the substance of a judgment. In the typical case this would mean that the judgment must identify the party found to be entitled to relief and the relief which the court is thereby ordering. The "correct copy of every final judgment" which the clerk is required to keep under Rule 79 (b), *supra,* p. 4, should at least include the name of the plaintiff, the name of the defendant, the amount[11] of the judgment, and who is to pay it to whom. Without such minimal information it is of little use. And if the copy of the judgment must con-

[11] By specific provision in Rule 58 this need not include costs.

tain such information we submit that the judgment itself must also contain it, at the least.

It should be noted that we are concerned only with the situation in which, under Rule 58, "the court directs that a party recover only money or costs or that all relief be denied". We need not consider what special cases there may be, if any, in which a district court could enter a final judgment as to liability, leaving the amount for subsequent litigation. *Cf.* Rule 38 (c) of the Court of Claims. In view of its special nature any such order, we believe, would constitute "judgment for other relief" within the meaning of Rule 58. There is no problem of ambiguity in such cases for there "the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk."

In short, however it is rendered and whatever roles are played by the judge and by the clerk, there is no judgment of a court until there exists somewhere, either in a separate document or in the transcript, an identifiable collection of words which constitute a judicial command that something specific be done. The statement in the district judge's opinion that "the plaintiff's motion is granted" (R. 4) was not a court order that the United States pay to the F. & M. Schaefer Brewing Company $7,189.57 plus interest thereon from February 19, 1954 in the amount of $542.80 (R. 5). It may be that the judge's opinion was sufficiently dispositive of the case so that the clerk would have been justified in immediately preparing a judgment for the court directing that the plaintiff recover the specified money amount from the defendant.

But that was not done. The court, as a unit, issued no such direction until May 24, 1955 (R. 4–5). We submit that the opinion of the district judge on April 14th did not constitute a judgment within the meaning of the Federal Rules of Civil Procedure.

II

THERE WAS NO ENTRY OF JUDGMENT UNTIL MAY 24TH

Even if our argument in Point I were to be rejected and the Court were to find that the opinion of the district judge in April was the judgment of the court within the meaning of the Federal Rules, we believe that the appeal below was still timely. The time for appeal runs not from the date of the judgment but from the "entry of the judgment" which requires specified action by the clerk. We submit that there was no entry of judgment until May 24, 1955.

A. APPEAL TIME RUNS FROM THE ENTRY OF JUDGMENT WHICH REQUIRES A NOTATION OF THE NATURE AND SUBSTANCE OF THE JUDGMENT IN THE CIVIL DOCKET

Rule 73 (a) provides that an appeal from a district court to a court of appeals shall be taken within a specified number of days—

> from the entry of the judgment appealed from * * *

Under Rule 58:

> The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. * * *

The entry of judgment is thus important not only for appeals but for fixing the time when judgment liens attach and execution and other process may issue.

Because of these factors, it is essential that the point in time when a judgment is entered and becomes effective should be made as definite and easily ascertainable as possible. Rule 79 (a) has provided for this certainty—by requiring the clerk to make an entry in the civil docket which shows the nature of every paper filed and the substance of the court's judgment.

Rule 79 (a) provides, in relevant part, as follows:

> All papers filed with the clerk, * * * shall be noted chronologically in the civil docket * * *. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. * * *

Rule 79 (a) thus imposes two requirements as to the notation of a judgment. First, the notation must show the *"nature"* of each paper filed or writ issued. Each paper must be identified by the clerk as to what it is. If a motion has been filed, it shall be identified as a motion; and if the judge has filed a paper the clerk shall show its nature in the civil docket. We believe this means, for example, that the clerk must show whether the document is in the nature of an "opinion" or of a "judgment".

Second, the notation in the civil docket must also show the *"substance"* of each judgment of the court. Thus, it would appear the requirement that the "substance" of a judgment or order be noted by the clerk

in the docket presupposes a more complete entry than for other papers or writs. In addition, Rule 79 (b) requires that the clerk keep a correct copy of every final judgment; but it is the notation of the "substance" of the judgment under Rule 79 (a) in the civil docket that is the prescribed condition precedent to its effectiveness.

The cases which have interpreted Rule 79 (a) hold that the "substance" of the judgment includes some statement that the entry is an entry of judgment, the prevailing or losing party must be identified, and the specific relief provided for by the judgment must be mentioned. These three elements are essential to give the notice which an entry of judgment is supposed to provide.

In *United States* v. *Cooke*, 215 F. 2d 528 (C. A. 9), a case involving a suit for refund of taxes and interest, the district court filed a decision which stated that judgment should enter for the plaintiff (215 F. 2d, at 530) "as prayed for in the complaint" and the docket entry read "Filing decision (McLaughlin—Favor Plaintiff)." The Ninth Circuit held that this notation, since it did not state the amounts to be recovered by the plaintiff, did not show the substance of the judgment and, accordingly, was not a judgment entry adequate to commence the appeal period. The opinion goes on to hold (215 F. 2d at 530): "We think that the bare statements of the names of the successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments."

Similarly, in *United States* v. *Higginson*, 238 F. 2d

439, while the First Circuit found it unnecessary to reach the question whether the docket entry showed the substance of the judgment, it referred to the *Cooke* decision and concluded that the failure to include in the *Higginson* entry the amount to be recovered by the plaintiff was (238 F. 2d at 443) a "further indication that this notation in the docket was not to be an entry of final judgment." In *Brown* v. *United States*, 225 F. 2d 861, involving judgment entered upon a jury verdict, the Eighth Circuit held that an entry which showed that a trial had been by jury, verdicts had been returned, and listed the amounts of the verdicts, did not show the substance of the judgment because the entry failed to include the term "judgment" or some other expression which would clearly convey the thought that the case had terminated. See also *Reynolds* v. *Wade*, 241 F. 2d 208 (C. A. 9); *Kam Koon Wan* v. *E. E. Black, Ltd.*, 182 F. 2d 146 (C. A. 9); *St. Louis Amusement Co.* v. *Paramount Film Distr. Corp.*, 156 F. 2d 400 (C. A. 8); *Uhl* v. *Dalton*, 151 F. 2d 502 (C. A. 9); *Lucas* v. *Western Casualty & Surety Co.*, 176 F. 2d 506 (C. A. 10).

B. THE APRIL 14TH NOTATION DID NOT MEET THE REQUIREMENTS OF THE RULES EITHER ON THEIR FACE OR AS THEY SHOULD BE INTERPRETED IN THE LIGHT OF THE PRACTICAL CONSIDERATIONS THEY SERVE.

In the instant case the clerk's entry of April 14, 1955, was as follows (R. 2):

> Decision rendered on motion for summary judgment. Motion granted. See opinion on file.

This entry indicated no more than that a motion for summary judgment had been granted and that an opinion was on file. Neither this entry nor any prior entry (R. 1–2) indicated which party had filed the motion. This entry did not state in whose favor the motion was granted, that the court had rendered judgment, or the amount of the judgment. Under these circumstances, it is not surprising that neither the judge, the clerk, nor either of the parties considered the earlier entry to constitute the entry of judgment.[12]

On the other hand, the clerk's entry on May 24, 1955, of the judgment in express form, which is as follows (R. 2):

> Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.

clearly shows the substance of the district court's judgment as required by Rule 79 (a). It states that judgment had been filed and docketed, identifies the losing party and sets forth the relief provided for in the judgment.

The court below, conceding (R. 13) that the April 14 docket entry of the decision on the motion was "not self-contained in the sense that a casual and uninformed reader would know what adjudication

[12] The record reveals (R. 10) that the plaintiff subsequently prepared and submitted the judgment in express form.

had been made, or anything more than that a decision had been rendered granting the motion for summary judgment * * *," nevertheless concluded that the notation showed the substance of the judgment on the ground that "The face of the entry itself would tell them [the litigants] all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details * * *."

In *United States* v. *Cooke,* 215 F. 2d 528 (C. A. 9), on the contrary, the court held that the fact that an examination of the pleadings would reveal the amount of the judgment to which the plaintiff is entitled, "does not give the *entries* the substance of those amounts", stating (215 F. 2d at 530):

> If the nature of the judgment entries is to be determined only after an examination of the issues presented by the parties' respective pleadings, there would be no necessity for Rule 79 (a) providing the entry must show the substance of the judgment.[13]

And in *Reynolds* v. *Wade,* 241 F. 2d 208, 210, the Ninth Circuit said:

> A docket entry that doesn't even say who won, surely cannot qualify.

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[13] The Ninth Circuit in *Cooke* distinguishes between judgement for plaintiff and judgment for defendant. In the latter instance a notation in the docket that the plaintiff was denied any relief might be sufficient to show the substance of the judgment. On the other hand, where judgment is for the plaintiff, the extent of the relief granted must be shown in the entry.

The construction afforded to Rule 79 (a) by the court below would drain all meaning from its requirement that the "nature" and "substance" of the judgment be noted in the civil docket. Certainly, it places no undue burden upon the clerk to require him to indicate that what is entered is a judgment, against whom, and for what specific amount of money.

The court below refers to "the people really involved, the litigants, their counsel, and, indeed, the clerk." This list omits the interest of third parties and the consequences of a judgment other than in fixing the time of appeal. As the Eighth Circuit has pointed out in *Brown* v. *United States*, 225 F. 2d 861, other persons may have an interest in the judgment and its entry apart from the question of appealability. The decision below, in holding that necessary information need not appear in the docket entry but may be gleaned from an examination of the entire file, would adversely affect these third parties. On the other hand, Rule 79 (a) apparently contemplates that one place be made available, the civil docket, where persons, other than litigants, who have important reasons for examining the docket book, can determine readily from its entries whether and when a judgment has been entered, its substance including the relief granted, without having to seek elsewhere.

Creditors of the party against whom a money judgment is entered are concerned both with the time when a judgment lien attaches and with the amount of the judgment. Under the decision below, where it is held that this necessary information need not be stated in

the judgment or its entry, it would have to be gleaned if possible from an examination of the entire file. As to third parties particularly, this would impose a large burden.

But even insofar as litigants are affected by the entry of the judgment, it is essential, because of its jurisdictional nature, and the serious consequences to the losing party, that the point in time from which the appeal period is measured should be made as definite and easily ascertainable as possible. If the clerk is not required to include the elements of the judgment in the docket entry as well as a definite statement that judgment has, indeed, been rendered, it would be difficult to determine safely when the time to appeal starts to run with the unfortunate practical consequences of premature and duplicate appeals discussed above, *supra*, p. 34.

We submit that, construing the Rules in the light of the practical consequences of a judgment, the notation of April 14th, which failed to indicate who won or how much, did not show the substance and nature of a judgment as required by Rule 79 (a), and that there was no entry of judgment until May 24th.

CONCLUSION

For the reasons given above, the judgment of the court below should be reversed and the case remanded with direction that the motion to dismiss the Gov-

ernment's appeal be denied and that the court below proceed to consider the appeal on the merits.

Respectfully submitted,

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APPENDIX

Brief Summary of Some Court of Appeals Cases Involving the Issue of Whether or When the District Court Had Rendered Judgment

In *Randall Foundation Inc.* v. *Riddell*, decided January 18, 1957 (C. A. 9), the language in the District Court's minute order:

> The judgment will be for the defendant. Counsel will prepare and submit Findings of Fact, Conclusions of Law, and Judgment under the Rules.

was held not to constitute the court's judgment on the ground it directed the subsequent entry of the appropriate judgment.

In *Cedar Creek Oil and Gas Co.*, 238 F. 2d 298 (C. A. 9) the conclusion of law of the District Court, that "Defendants are entitled to a judgment for costs and disbursements herein," and the sentence added to the District Court's findings of fact and conclusions of law, "Judgment is hereby ORDERED to be entered accordingly", were held not to constitute the court's judgment. The Court of Appeals held that these words "lack any conclusive indication of finality," and "a certain element of 'nowness'," but instead "slant forward."

In *Lucas* v. *Western Casualty & Surety Co.*, 176 F. 2d 506 (C. A. 10), the following entry was made by the clerk (p. 507):

> Enter record of trial before the Court. Counsel stipulate all facts. Judgment entered favor deft., T. M. Lucas, in sum of $383.50 for sums

> earned and denied as to unearned amounts. Counsel directed to exchange briefs, and further trial continued to November 15, 1948, 9:30 A. M.

The Tenth Circuit held (176 F. 2d at 508) that the entry did not specifically direct that Lucas recover money or costs, and furthermore, the entry recited that counsel was to file a brief and the trial was continued to a later date. Consequently, the Court of Appeals held that the District Court did not "intend a final disposition" when the first entry was made.

In *Scott* v. *Gearner,* 197 F. 2d 93 (C. A. 5), the District Court, after taking testimony, and making certain findings and conclusions, stated: "I will ask you to prepare the decree, Gentlemen, to be okayed by the other side, as to form, saving such exceptions as they may wish." The clerk's entry was: "Entering judgment for plaintiff; collector enjoined; foreclosure as to Marvin Lunsford's interest granted." The Fifth Circuit held (197 F. 2d at 96) that the District Court's opinion was not its judgment, since the opinion directed counsel to prepare the decree and provided for exceptions.

In *In re D'Arcy,* 142 F. 2d 313 (C. A. 3), the referee in bankruptcy issued an order granting the bankrupt his discharge. The district court confirmed the order, and issued a memorandum which ended with "The order of discharge is affirmed." The memorandum was not signed by the judge but was entered by the clerk as "Memorandum (Smith)." The Third Circuit held that the district court's statement in its opinion, even though couched in mandatory terms, might serve as its judgment. The Court of Appeals pointed out, however, that the mandatory language of the opinion was never entered in the docket. Thus,

even if this language might constitute a clear direction, the Court of Appeals stated that this language was never entered and, accordingly, the entry of the opinion was not an effective entry of judgment under Rules 58 and 79 (a).

In the following cases the various Courts of Appeals also held that language appended to the district court's opinion or order was not sufficiently definitive to constitute the district court's judgment.

In *St. Louis Amusement Co.* v. *Paramount Film Distr. Corp.*, 156 F. 2d 400 (C. A. 8), a document filed by the district court, which was entitled (156 F. 2d at 401) "Opinion and Order Sustaining Motions of Defendants to Dismiss and for Summary Judgment" and which concludes by stating that "The motions of defendants to dismiss and for summary judgments are sustained", was held not to constitute the court's judgment. In *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (C. A. 9), an order of the district court granting defendant's motion for summary judgment was held to be merely an announcement that the district court intended to enter judgment, and was not intended to be the rendition of the judgment. Similarly, in *Wright* v. *Gibson*, 128 F. 2d 865 (C. A. 9), an opinion which concluded with the statement (128 F. 2d at 866) "The motion * * * is granted" was held not to constitute the court's judgment. *Uhl* v. *Dalton*, 151 F. 2d 502 (C. A. 9), held that an opinion which did not find the facts and state conclusions of law and declared that neither party was entitled to a judgment, was not a direction to enter judgment.

In *Kam Koon Wan* v. *E. E. Black, Limited*, 182 F. 2d 146 (C. A. 9), two "so-called" judgments which did not adjudicate all the claims invoked, were held not to contain the necessary determination and direction to have a judgment entered. *Weldon* v. *United*

States, 196 F. 2d 874, 875–876 (C. A. 9), held that a "so-called minute order—an unsigned typewritten paper filed with the clerk of the District Court * * *" purporting to deny petitions for suppression of evidence and return of seized property, and which was not entered, was not an effective judgment. *Lucas* v. *Western Casualty & Surety Co.,* 176 F. 2d 506 (C. A. 10), held that a direction by the district court that judgment was entered in favor of the defendant and counsel was directed to exchange briefs and further trial continued did not constitute a direction to enter judgment forthwith. In *Kanatser* v. *Chrysler Corp.,* 199 F. 2d 610, 622 (C. A. 10), the trial judge filed a memorandum of its views indicating what its judgment would be. This was held not to constitute the court's final judgment until it was formally entered by the clerk at the court's direction. Instead, the Tenth Circuit held that the entry of the formal judgment on the verdict of the jury was the effective entry of judgment. In *Fleming* v. *Van Der Loo,* 160 F. 2d 905 (C. A. D. C.), a memorandum opinion of the district court which stated, *inter alia,* "Damages denied. Petition for injunction granted", but did not contain any provisions with respect to the claim for damages, was not an effective judgment. See also *Healy* v. *Pennsylvania R. Co.,* 181 F. 2d 934 (C. A. 3); *Fast, Inc.* v. *Shaner,* 181 F. 2d 937 (C. A. 3); *Alameda* v. *Paraffine Companies,* 169 F. 2d 408 (C. A. 9); Commentary, Entry of Judgment, 18 Fed. Rules' Service 927.

On the other hand, in the following cases the Courts of Appeals held that the various statements appended to the district courts' opinions or orders were sufficiently definitive to constitute the courts' judgments. In *Sosa* v. *Royal Bank of Canada,* 134 F. 2d 955 (C. A. 1), an order which dismissed the complaint, awarded costs and directed the issuance of execution therefor

was held to constitute the judgment. Similarly, in *In re Forstner Chain Corp.*, 177 F. 2d 572, the First Circuit held that where the district court filed an opinion which held that a claim on a patent was invalid and which concluded with (177 F. 2d at 574) "Judgment may be entered for the defendant for costs", and where a separate formal document labeled "Judgment" or "Final Decree" was never filed, the opinion constituted the district court's judgment. *Bowles* v. *Rice*, 152 F. 2d 543, 544 (C. A. 6), held that a "formal signed order which recites, 'It is ordered that the restraining order heretofore entered be dissolved and the motion for temporary injunction be denied' " was "an unequivocal denial of the prayer for temporary injunction, and from it an appeal could have been taken." In *Steccone* v. *Morse-Starrett Products Co.*, 191 F. 2d 197 (C. A. 9), an order of the district court denying a motion to quash a writ of execution and an order denying a motion to enter final judgment, were held not to constitute the court's judgment; a memorandum opinion signed by the district court which adjudicated all the matters in controversy and ordered the defendant to cease and desist from certain named activities was held to constitute the district court's judgment. In *Woods* v. *Nicholas*, 163 F. 2d 615 (C. A. 10), the district court filed findings of fact and conclusions of law which concluded with the statement that (163 F. 2d at 617) "judgment will be entered against the plaintiff and in favor of the defendant. Counsel will draw up a proper form of judgment." Subsequently, the court entered a formal judgment which recited that "the action be dismissed with prejudice as of July 18, 1946 [the date of the entry of its findings and conclusions]; and that the records be corrected in accordance therewith." The Court of Appeals concluded that the findings and conclusions constituted the judgment of the district court.

In *Reynolds* v. *Wade,* 241 F. 2d 208 (C. A. 9), the district court filed an opinion which held that the complaint did not state a cause of action, and which concluded with the following sentence: "The motion for dismissal is granted and the case is dismissed." Subsequently, the district court filed a separate paper called "Judgment and Decree", which decreed that the "defendant recover attorney fees in the amount of $250.00" and, as to the plaintiff's complaint, stated as follows: "It is hereby ordered, adjudged and decreed that the complaint be and it is hereby dismissed for the reasons stated in the court's opinion of March 26, 1956." The two pertinent docket entries were as follows:

Mar. 26. Opinion filed.
April 23. Judgment filed and entered.

The Court of Appeals held that although the concluding sentence of the district court's opinion was "judgment talk", language which merely dismissed the complaint, but did not dismiss the action, did not constitute a final judgment and, accordingly, no judgment had been filed and entered in the case. Additionally, the Court of Appeals held that the entries did not include the substance of the judgment.

In the following cases the Second Circuit held that a judgment was rendered when the district court issued its opinion or memorandum. In *United States* v. *Wissahickon Tool Works,* 200 F. 2d 936, the district court issued an opinion which granted summary judgment in favor of the plaintiff. Subsequently the district court signed an "Order and Judgment" which was submitted by the plaintiff and which embodied the mandate of the opinion as well as the denial of subsequent motions to reargue. The Court of Appeals held that the granting of the motion for summary

judgment constituted the court's judgment. In *United States* v. *Roth*, 208 F. 2d 467, an opinion which concluded with the statement that motions to dismiss indictments "are granted and the Government is directed to return, to the respective defendants," their records, and "As the indictments are dismissed, it is unnecessary to consider the other motions which are directed to the indictments", was held to constitute the judgment rather than order which the court signed at a later date, which stated that the motions to dismiss "are hereby granted" and which ordered the Government to return their records to the defendants. In *Napier* v. *Delaware, Lackawanna and Western R. Co.*, 223 F. 2d 28, after a jury verdict had been rendered and entered, a motion for a new trial was filed. The Court of Appeals held that the district court's judgment became final and appealable when it issued a memorandum decision which concluded with the following: "The motion is denied in its entirety and it is so ordered," and not from a subsequently signed order which was wholly duplicative of the memorandum decision. Cf. *Edwards* v. *Doctors Hospital*, 242 F. 2d 888 (C. A. 2).

U. S. GOVERNMENT PRINTING OFFICE: 1956

No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
JOHN N. STULL,
Acting Assistant Attorney General,
LEONARD B. SAND,
Assistant to the Solicitor General,
I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys,
Department of Justice, Washington 25, D. C.

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CITATIONS

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Taxpayer urges (Br. p. 11) that: "Far from being desirable in a money case, a formal judgment serves no purpose and can only lead to useless delay." If taxpayer means to imply that the effect of the decision below is to eliminate entirely the use of formal judgments and to have the opinion serve, for all purposes, both as a decision and a judgment, we submit that taxpayer is mistaken. An analysis of the purposes served by a formal judgment and of the practices of the Eastern and Southern Districts of New York demonstrates that formal judgments will still be needed and used, even in "money" cases. The consequences of adherence to the decision below would frequently be, not to eliminate a formal judgment,

but rather to require two judgments having different dates and serving different purposes. As we shall show, in the Eastern and Southern Districts of New York, attempts to comply with the decision below have resulted in confusion and duplication of effort because of the existence of two documents each purporting for some purposes to be "the judgment." Nothing in the Federal Rules of Civil Procedure suggests that there shall be more than one judgment and the disadvantages of having two judgments far outweighs any supposed advantage in expediting appeals. Moreover, as we show in our principal brief (pp. 28–30), a procedure which would, contrary to the decision below, measure the time for appeal from the entry of a formal judgment, as the rule rather than the exception, need not result in unnecessary delays.

1. A FORMAL JUDGMENT IS OFTEN NEEDED TO OBTAIN PAYMENT OR EXECUTION

The facts of the instant case themselves furnish a compelling example of the need for a *judgment*, which is preferably a document separate and distinct from the opinion, but which is, in any event, an explicit and recognizable statement of "who is to pay what to whom."

In this case, the opinion of the district court indicated the amount sought in the complaint,[1] but did

[1] The opinion did not state the date on which taxpayer paid the taxes, refund of which was sought in the complaint. It would not, therefore, have been possible to compute the amount of interest due the taxpayer under Section 6611 of the Internal Revenue Code of 1954, 26 U. S. C., Supp. IV, 6611, without going outside the opinion.

not contain a specific direction that the opinion be entered as a judgment. In the Eastern District of New York, an opinion has been regarded as the "judgment" only where the opinion is rendered on a motion,[2] the relief sought is for money only, the opinion states the amount of the judgment, and the opinion specifically directs that it be entered as the judgment. Therefore, pursuant to the practices of the Clerk's office of the Eastern District of New York, this opinion was not regarded as the judgment but was entered in the civil docket as a "decision rendered." (R. 2.)[3]

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[2] In non-jury trials it is the practice in the Eastern District of New York to file a formal judgment in every case. Presumably, this is not always done where the case is disposed of by motion or order because of local Rule 10 (a). See our principal brief, pp. 26–27, fn. 6.

As to local Rule 10 (a), the Second Circuit has recognized that it merely "supplement[s]" (*United States* v. *Wissahickon Tool Works*, 200 F. 2d 936, 938), or is "corroborative of the practice actually required by F. R. 58": *Matteson* v. *United States*, 240 F. 2d 517, 518. Moreover, even if there were a conflict in practical operation between local Rule 10 (a) and the Federal Rule, obviously the former must yield if uniformity within the federal judicature is to be attained. See F. R. 83; cf. *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, 288. Since Rule 10 (a) does not prevent the district judge from making an order in more extended form than in the memorandum of the determination of the motion, we do not believe the local rule conflicts with F. R. 58, especially where, as here, the district judge in fact signs a formal order.

[3] In recognition of this, taxpayer states (Br. p. 1) that the question presented is "Whether the time for appeal * * * runs from the date of filing and docketing of a *decision* of the United States District Court * * *." (Emphasis added.)

When, on May 24, 1955, the district judge signed the formal order submitted by taxpayer,[4] this document was stamped "Judgment Rendered" and the appropriate entry was made in the civil docket, pursuant to the local practice. (R. 2.) Also pursuant to the local practice, only after this was done was an entry made in the "Judgment Docket" (see F. R. C. P. 79 (c)) which lists, under the name of the judgment debtor, the date of the judgment, the amount of the judgment, the name of the creditor, and the date of payment or satisfaction. May 24, 1955, was the first occasion upon which any interested person could ascertain from the judgment docket of the Eastern District of New York that there was a judgment in this litigation.

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[4] Under local Rule 13, the formal judgment could be submitted to the district judge only on notice to the adverse party, here the United States. If the district judge had refused to sign the order because he construed his prior opinion as a judgment finally disposing of the case, the United States could then have filed a timely notice of appeal from the opinion since the sixty day period had not yet expired. Thus, the court below held that the Government was precluded from appellate review on the merits because it construed the original opinion in precisely the same manner as did the taxpayer, the district judge who wrote the opinion, and the district court clerks who made the docket entries.

[5] A certified copy of the judgment docket entry of May 24, 1955, has been filed with the Clerk of the Court. See Appendix A, *infra*, p. 10.

In an affidavit dated December 9, 1957, also filed with the Clerk of this Court, Karl Schneidler, Attorney, Department of Justice, states that he has searched the judgment docket of the Eastern District of New York and that the May 24, 1955, entry is the earliest and only entry found for this case in that docket. See Appendix B, *infra*, p. 11.

Taxpayer's contention (Br. pp. 15-16), that the civil docket entry of April 11th enabled any "third person interested in the

To secure payment from the United States taxpayer would have had to submit a certified copy of the judgment which contained the precise amount of the recovery.[*] And, even as to private litigants, a judgment clearly recognizable as such and entered in the judgment docket is necessary in the Eastern and Southern Districts of New York to secure either a writ of execution of the judgment, a certified copy of the judgment, or a transcript of the judgment. These documents are needed where a judgment is to be recorded or registered elsewhere. See principal

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outcome" to ascertain the truth. Aside from the fact that no entry is, or was, made in the "Judgment Docket" until a document is signed which is said to be the judgment and which is officially part of the judgment.

[*] By letter dated December 6, 1957, the Chief Counsel, Internal Revenue Service, has informed us that the practice followed by the Treasury Department with respect to refund payments is as follows:

"As you know, prior to Treasury Decision 6219, C.B. 1956-2, p. 1371, Sections 29.1(a)(2) 5, 6, 7 of Regulations on Procedure and Administration required that claim for refund together with certain supporting documents, including a certified copy of the judgment, be filed with the Commissioner. Strict compliance with these regulations was required and no refunds were made without such compliance.

"As a consequence of Treasury Decision 6219 and in order to facilitate the payment of judgments, practically the same procedure, eliminating only the necessity for filing the claim for refund but requiring the supporting documents, including a certified copy of the judgment, has been adopted.

"Under the old procedure requiring the claim for refund, as well as under the present procedure, it has been the consistent policy of the Internal Revenue Service not to make any refund under any court order or decision unless pursuant to a judgment, order or other document, issued by or under the authority of the court, specifically setting forth the amount of the recovery, interest, costs, etc."

brief, pp. 34–35. Thus, far from serving "no purpose," the formal judgment often serves the only purpose for which the suit was brought—*i. e.*, it enables the successful litigant to obtain his money.

2. THE DECISION BELOW LEADS TO UNCERTAINTY RESULTING FROM "TWO JUDGMENTS"

Taxpayer states (Br. p. 11) that, "Whichever way this case is decided, the decision of this Court will eliminate confusion as to the correct rule." However, we submit that it is important, not merely that this case be decided, but that it be decided in a manner which will encourage certainty and dispatch, and that these objectives would best be served by reversing the decision below.

We respectfully suggest that the court below has attributed the practice of submitting formal judgments to an automatic adherence to state practice (*Matteson* v. *United States*, 240 F. 2d 517, 519), without sufficiently recognizing that a genuine need for a document serving the purposes of a formal judgment may underly that state practice. The Second Circuit also disparages the practice of district judges signing formal judgments, "the later form from which all the confusion arises" (*ibid.* at 518). But, as we have shown in Point I, *supra*, documents containing the elements of a formal judgment are needed for many purposes by the successful litigant. If the district judge refuses to sign a formal order and his initial opinion lacks the clarity or information sufficient for it to serve as a satisfactory judgment, the litigant will encounter difficulties in securing execution and recordation, and may have to resort to further litigation.

(For example, he may have to move to have judgment docketed for a specific sum or to have a formal judgment signed and entered.) In our view, the necessary consequence of the decision below will be that, in many cases, as in the instant case, there will ultimately be two documents said to be judgments. The first "judgment" will be the opinion, the entry of which measures the time to appeal. The second "judgment" will be the formal judgment, signed and docketed either for the purposes shown in Point I, *supra*, or because of uncertainty as to the judgment-status of the opinion itself.

But the existence of two "judgments," bearing different dates and serving different purposes, a concept entirely unrecognized by the Federal Rules of Civil Procedure, has (among others) the following unfortunate consequences:

(*a*) two notices of appeal may be filed (see our principal brief, p. 34), creating confusion as to which judgment is, in fact, being appealed and the date on which the record is due to be docketed in the Court of Appeals under F. R. C. P. 73 (g).

(*b*) the time to appeal may begin to run before the parties are in a position to evaluate with certainty the real consequences of the decision (see our principal brief, pp. 32–33). For example, in a tax case, the decision of the district judge may establish that a certain disputed transaction is to be treated as a sale rather than a gift. This determination may require a reconstruction of the taxpayer's tax liability for the year in which the transaction took place and, because of carry-overs and carry-backs, for other years as

well.[7] Computation of the amount of the judgment may involve matters concerning which the district judge is not then aware. (Nor is there any need for the court or the clerks to concern themselves with such matters; they may well be left for resolution by the parties within time limits set by the court.) But if the district judge's opinion uses "judgment" language, there is a real danger that the Court of Appeals will accord to it the status of a judgment, despite the fact that the judge later signs a formal judgment. The time to appeal may therefore expire before the economic consequences of the judgment can be fairly evaluated.

(*c*) a document which will be treated as a "judgment" in the federal courts may exist, but a creditor or other interested third party, whose only feasible reference source is the judgment docket, will be unable to locate the "judgment". See p. 4, *supra*.

In summary, we submit that considerable uncertainty is injected by the decision below into this area of the law where certainty is of extreme importance to the rights of the litigants. See, *e. g.*, *Edwards* v. *Doctors Hospital*, Case III, 242 F. 2d 888, 891–892, in which only by a study of the trial transcript could it be ascertained that the "decision" was not the "judgment."

CONCLUSION

For the reasons given above and in our principal brief, the judgment of the court below should be re-

[7] It is for this reason that a refund will not be made to a taxpayer unless the exact amount of the recovery is set forth in the certified copy of the judgment. See p. 5, *supra*, fn. 6.

versed and the case remanded with directions that the motion to dismiss the Government's appeal be denied and that the court below proceed to consider the appeal on the merits.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
JOHN N. STULL,
Acting Assistant Attorney General.
LEONARD B. SAND,
Assistant to the Solicitor General.
I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys.

DECEMBER 1957.

APPENDIX A

Certified Copy of the Judgment

Names of parties against whom judgments have been obtained	Names of parties in whose favor judgments have been obtained
United States of America	The F & M Schaefer Brewing Co.

Civ. 14715

Amount of Judgment	Names of Attorneys	When Docketed
$7,769.37		May 24, 1955
$7,769.37		

United States of America

Clerk's Office

U. S. District Court for the
Eastern District of New York, *ss.:*

I CERTIFY, That the foregoing is a correct Transcript from the Docket of JUDGMENTS.

Dated, Brooklyn, N. Y., December 6, 1957.

[SEAL] Sidney R. Feuer,
Clerk.

By Thomas B. Costello,
Deputy Clerk.

APPENDIX B

In the Supreme Court of the United States

No. 79

UNITED STATES OF AMERICA

v.

THE F. & M. SCHAEFER BREWING COMPANY

CITY OF WASHINGTON,

DISTRICT OF COLUMBIA, *ss:*

Karl Schmeidler, being duly sworn, deposes and says:

1. I am an attorney in the Department of Justice and I am familiar with the proceedings in the case of *United States of America v. The F. & M. Schaefer Brewing Company* (No. 79, October Term, 1957).

2. On December 3, 1957, I searched the judgment docket for the Eastern District of New York. An entry appears in that docket for this proceeding in the District Court below as of May 24, 1955. This is the earliest and only entry in this case which I found in the judgment docket for the Eastern District of New York.

(s) KARL SCHMEIDLER.

Sworn to, before me, this 9th day of December 1957.

(s) W. E. HOUSE, *Notary Public.*

My commission expires January 31, 1960.

[SEAL]

U. S. GOVERNMENT PRINTING OFFICE 1957

No. 79.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

UNITED STATES OF AMERICA,

Petitioner,

v.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE F. & M. SCHAEFER BREWING CO.

WALTER S. ORR,
THOMAS C. BURKE,
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New York 5, New York

WHITE & CASE,
New York City,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 79.

UNITED STATES OF AMERICA,

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v.

THE F. & M. SCHAEFER BREWING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE F. & M. SCHAEFER BREWING CO.

Question Presented.

Whether the time for appeal to the United States Court of Appeals for the Second Circuit runs from the date of filing and docketing of a decision of the United States District Court for the Eastern District of New York granting a motion for summary judgment for money only, or whether the time for appeal begins to run only after the signing and docketing of a formal order for recovery of the sum in suit.

Rules Involved.

Federal Rules of Civil Procedure:

Rule 54. JUDGMENTS; COSTS.

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

* * * * * *

Rule 58 [As amended December 27, 1946]. ENTRY OF JUDGMENT.

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73 [As amended December 27, 1946, and December 29, 1948]. APPEAL TO A COURT OF APPEALS.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of

appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

A party may appeal from a judgment by filing with the district court a notice of appeal. * * *

* * * * * *

Rule 79 [As amended December 27, 1946, and December 29, 1948]. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) *Civil Docket.* The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk

shall enter the word "jury" on the folio assigned to that action.

(b) *Civil Judgments and Orders.* The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

* * * * * * *

Statement.

The F. & M. Schaefer Brewing Co., respondent here and plaintiff below, brought action in the United States District Court for the Eastern District of New York to recover $7,189.57 stamp taxes paid by it, together with interest and costs. Defendant's answer admitted the payment. Thereafter plaintiff moved for summary judgment. Following a hearing of the motion, Judge Rayfiel, on April 14, 1955, filed a two-page memorandum decision which recited that plaintiff had moved for summary judgment, referred to the specific amount in suit and ended with the words:

"* * * the plaintiff's motion is granted."

On the same day, the clerk of the district court made the following docket entry:

"April 14 Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file."

Subsequently, plaintiff submitted a formalized judgment, which the Judge signed on May 24, 1955. Thereupon the clerk made an entry in the docket as follows: "May 24

Raytiel, *J.* Judgment filed and docketed against defendant in the sum of $7,189.57 with interest of $542.80 together with costs $37 amounting in all to $7,769.37. Bill of Costs attached to judgment."

The defendant filed its notice of appeal on July 21, 1955, that is, 96 days from the original grant of summary judgment and 58 days from the filing of the formalized judgment. Plaintiff moved to dismiss the appeal on the ground that the notice was not filed within the 60-day period from the date of entry of judgment permitted under Rule 73(a), F. R. C. P. By unanimous decision of the United States Court of Appeals for the Second Circuit, sitting *en banc*, the plaintiff's motion was granted and the appeal dismissed. 236 F. 2d 889.[1] This Court granted certiorari.

Summary of Argument.

The opinion of the district court, which entitled the plaintiff to recover only money, represented a complete adjudication of the case. This being so, the opinion itself contained all the elements of a judgment under Rule 58 and constituted the judgment when filed. The subsequent formal order signed by the judge could not destroy the effect of the judgment which already had been rendered or delay the time for appeal. Alternatively, even if Rule 58, standing alone, should not be held to require that the opinion be considered the judgment, nevertheless, in light of applicable local rules of court, the opinion must be deemed to have constituted the judgment.

There having been a judgment at the time the decision was rendered, there was also a proper entry of judgment

[1] It may be noted that the opinion of the Second Circuit was written by Chief Judge Clark who has long been a leader in the development of the Federal Rules, first as Reporter and now as Chairman of the Advisory Committee on Rules for Civil Procedure.

when the clerk of the district court noted the decision in the docket; for once judgment has been rendered all that is required for a proper entry of judgment is that the docket entry make clear what has been done. Inasmuch as the appeal was taken more than 60 days after entry of judgment, the appeal was untimely.

ARGUMENT.

Under Rule 73(a), F. R. C. P., the time within which an appeal may be taken in cases in which the United States is a party is 60 days from the entry of the judgment appealed from. Thus, in order to determine whether an appeal is timely, it is necessary to determine when there is a judgment and the date when the judgment was entered. It is submitted that the memorandum decision filed on April 14, 1955 constituted the judgment and that judgment was duly entered when the clerk made his docket entry on the same day. As the government's appeal was taken more than 60 days thereafter, the appeal was untimely and was properly dismissed.

I.

The memorandum decision of the District Court for the Eastern District of New York, granting summary judgment for a sum of money only, constituted the judgment.

A. Under Rule 58, the final decision of a district court that a party is entitled to recover only money constitutes the judgment, and a subsequent formal order of the court does not operate to postpone judgment.

The Rules do not contain any precise definition of a "judgment", the only definition being in Rule 54(a), F. R. C. P., which states that a judgment "includes a decree

and any order from which an appeal lies." There is no indication in Rule 54(a) whether or not a judgment need be embodied in a separate formal document. However, when we turn to Rule 58, it is manifestly clear that a formal judgment is neither required nor appropriate where there has been complete adjudication in an action for money only. Rule 58 provides, in part:

> "* * * When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. * * *"

Not only does Rule 58 require the clerk to enter judgment *forthwith* upon a direction for the recovery of money only, but this requirement stands in sharp contrast to the provision requiring a formal order where other types of relief are involved.

The purpose of Rule 58 to do away with formal judgments in money cases is also shown by the history of the amendments to the Rule. In 1946, Rule 58 was amended as follows (the language in brackets below having been deleted and the language in italics having been added):

> "* * * When the court directs [the entry of a judgment] that a party recover only money or costs or that [there be no recovery] *all relief be denied*, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. * * *"

This amendment is explained in the Notes prepared by the Advisory Committee on Rules for Civil Procedure,

which drafted the amendment, as follows (10 Fed. Rules Serv. cxviii):

> "The substitution of the more inclusive phrase 'all relief be denied' for the words 'there be no recovery', makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court."

The Notes of the Advisory Committee thus make clear the intent that there should be no formal judgment in cases where all relief is denied. Inasmuch as exactly the same provision of Rule 58 applies to cases where the court grants a recovery only of money, it is equally clear that no formal judgment is to be filed in such cases.

The government's historical analysis (Brief pp. 14-15), which seeks to trace the meaning of the word "judgment" to a source in the old Federal Equity Rules and from which the inference evidently is drawn that, as in equity, a judgment must be represented by a formal order or decree, is unpersuasive. Rule 58, by its reference to "judgment for other relief", expressly provides for a formal judgment or decree where relief of an equitable nature is involved, but the Rule makes no such provision where a recovery of money, the very antithesis of equitable relief, is involved.

In light of the clear command of Rule 58, further illuminated by its background, the opinion in the instant case, which expressly set forth the amount for which summary judgment was sought and ended in final adjudication with the words "* * * the plaintiff's motion is granted", contained all that was required for a direction for judgment. There being such a direction, all that remained was for the clerk to enter the judgment in the docket. The subse-

quent action of the district judge in signing a formalized order could not deprive the earlier judgment of the validity which it already had.

The decision of this Court in *United States v. Hark*, 320 U. S. 531 (1944), upon which the government so strongly relies, does not stand for a contrary view. The *Hark* case was a criminal case which arose under the Criminal Appeals Act. In holding that the subsequent formal order signed by the district judge, rather than the opinion, constituted the judgment, this Court noted that it was "without the benefit of a rule such as Rule 58 of the Federal Rules of Civil Procedure". The Court went on to state (320 U. S. at 534):

> "The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. * * * *Unaided by statute or rule of court* we must decide on the bare record before us what constitutes the decision or judgment of the court below from which appeal must be taken within thirty days after rendition." (Emphasis added.)

The same result would not have been reached in cases to which Rule 58 is applicable and which involve the recovery only of money. See also *United States v. Roth* (2 Cir. 1953), 208 F. 2d 467, where the court said:

> "Unlike the civil rules, under which the lack of timely appeal here would be quite clear, see Fed. Rules Civ. Proc. rule 58; *United States v. Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, 939, and cases cited, the federal rules of criminal procedure do not cover the point in issue; * * *"

In civil cases involving money judgments the "judicial determination . . . of the court upon a matter within its jurisdiction" (*U. S.* v. *Hark*, *supra*), is evidenced by the opinion itself and there is required no formal judgment. To the extent that *United States* v. *Higginson* (1 Cir. 1956), 238 F. 2d 439, stands for a contrary view, it is not in harmony with Rule 58. Cf. *Papanikolaou* v. *Atlantic Freighters* (4 Cir. 1956), 232 F. 2d 663. On the other hand, the other cases relied upon by the government do not support the view that a formal judgment is required where the opinion of the court finally adjudicates that a party is entitled to recover only money or that all relief be denied. In *Cedar Creek Oil and Gas Co.* v. *Fidelity Gas Co.* (9 Cir. 1956), 238 F. 2d 298, although all relief was denied to the plaintiff, the defendant was granted relief other than for money. In *Randall Foundation, Inc.* v. *Riddell* (9 Cir. 1957), 244 F. 2d 803, the court expressly instructed counsel to prepare a formal judgment and thus there could be no final adjudication until a formal order was signed. *Reynolds* v. *Wade* (9 Cir. 1957), 241 F. 2d 208, did not turn upon the question whether the court's opinion constituted the judgment but rather upon the question whether the docket entries were sufficient to constitute an entry of judgment.

The position for which we contend does not conflict with the provisions of Rule 79(b), as the government evidently implies (Brief p. 20). Rule 79(b) requires the clerk to keep a copy of every final judgment or appealable order. However, a copy of the opinion on file would satisfy the requirements of the Rule equally well as would a copy of a formal judgment. In the instant case, the docket entry by the clerk expressly directed attention to the "opinion on file."

The government's lengthy discussion (Brief pp. 20-36) as to the desirability of a formal judgment is not helpful. It merely represents one view as to what the rule might be if Rule 58 did not apply; and the discussion is followed (Brief p. 36) by the admission that "a judgment need not be formal". Far from being desirable in a money case, a formal judgment serves no purpose and can only lead to useless delay. Even so short a delay of entry of judgment as delay for the taxing of costs is proscribed by Rule 58. If delay for the taxing of costs, a necessary process in litigation is considered unjustifiable, surely so useless a delay as that required for the repetition in a formal document of relief which has already been granted should not be sanctioned.

Moreover, the government's expressed concern as to the confusion which might arise if formal judgments are not required is without foundation. Whichever way this case is decided, the decision of this Court will eliminate confusion as to the correct rule. That rule, we submit, is that where the opinion of the district court shows complete adjudication in a money action, the opinion itself constitutes the judgment. On the other hand, where the court indicates that more is to be done, such as by appending to its opinion the words "Settle order", there is no final adjudication and the opinion does not constitute the judgment. The government criticizes this rule by pointing to the group of cases reported together as *Edwards* v. *Doctors Hospital* (2 Cir. 1957), 242 F. 2d 888, in one of which (Case No. II) the words "Settle order" appeared at the end of the district judge's opinion even though the opinion left no aspect of the case undecided and, without the words "Settle order," would have shown complete adjudication. In that case the court held that the opinion did not consti-

tute the judgment, as it lacked the finality essential to a judgment. However, we fail to perceive how confusion could result from such a holding; for the test to be applied is not whether the judge might have shown complete adjudication had he chosen to do so, but rather whether he did so. Such a test leaves control over judgments where it belongs: in the hands of the court.

It is, of course, incumbent upon judges to make their intentions clear. In the Appendix to the government's Brief there are cited cases where the judicial intent is said not to have been clear. Assuming this to be so, such cases demonstrate a need for better understanding of the rule, not a need for changing it. As Judge Clark pointed out in *Matteson* v. *United States* (2 Cir. 1956), 240 F. 2d 517:

> "It seems probable that most trial judges respect the spirit of the rules and attempt to make their directions clear and free of ambiguity; but both experience and the reported cases show that a certain number (increasingly fewer, we venture to believe) do not. We state this without attempting to assess blame upon either the counsel who presents or the judge who signs the later form from which all the confusion arises; the strong state practice to the contrary, the tendency of many attorneys to overlook or neglect details of federal practice, the natural willingness of judges pressed *ex parte* 'to expedite the appeal'—all tend that way; and the only remedy seems to be increased knowledge of a different federal practice consistently applied."

Here, however, there was no such ambiguity in the opinion of the district judge. The finality of the adjudication was clear, and the opinion constituted the judgment when filed.

B. In any event, the decision of the district court must be deemed to have constituted the judgment in this case in light of local rules and settled law in the Circuit.

Even if this Court should hold that an opinion of a district court finally adjudicating an action for money only would not, in all districts, constitute the judgment, nevertheless the opinion of the district court in the instant case must be deemed to have constituted the judgment when viewed in light of applicable local rules.

In *United States* v. *Hark*, *supra*, though forced to decide the case "unaided by . . . rule of court", this Court nevertheless indicated that where the intent of the district judge is not clear, the question as to what constitutes the judgment may be resolved by reference to local rules and practice. See also *Commissioner* v. *Estate of Bedford*, 325 U. S. 282.

Even the government, by its discussion (Brief pp. 21-23, 35, 41) of the practice prevailing in various jurisdictions, emphasizes the significance of local rules and practice. It is appropriate to ask, however, what local rules are relevant. It is obviously not the rules prevailing in other jurisdictions, to which the government draws attention, but rather the rules prevailing in the district having jurisdiction of the case—here, the Eastern District of New York.

Rule 10(a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York provides:

> "A memorandum of the determination of a motion, signed by the judge, shall constitute the order." [2]

[2] The complete rule reads as follows:

"Rule 10. Orders.

"(a) A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein con-

Thus, even assuming that the opinion in the instant case might not otherwise be considered as containing the words of direction which the government claims to be essential under Rule 58, F. R. C. P., there was clearly such a "direction" when the actions of the court are examined in light of local Rule 10(a). The memorandum opinion determining the motion for summary judgment itself constituted the *order*.

Moreover, the meaning of local Rule 10(a) is not open to doubt, for the Second Circuit has consistently held that where an opinion represents complete adjudication of a case, under Rule 10(a) the opinion constitutes the judgment and a subsequent formal order signed by the district judge at the behest of a party does not have the effect of delaying judgment. *United States* v. *Roth*, *supra*; see *United States* v. *Wissahickon Tool Works* (2 Cir. 1952) 200 F. 2d 936.

In light of local Rule 10(a) and the clear pronouncements of the Second Circuit regarding it, there can be no presumption that the formal order signed by the judge in the instant case constituted the judgment as the government contends. On the contrary, it should be presumed that the district judge, in filing an opinion showing complete adjudication, was not unaware of the rules of court in his own district and the decisions of the Second Circuit interpreting

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tained shall prevent the court from making an order, either original or on an application for resettlement, in more extended form."

As the court said in the footnote in *U. S.* v. *Roth*, *supra*: "There may be seeds of ambiguity lurking here as to the effect of granting an application for resettlement of an order. But since no such application was made below, the provision quoted is not presently applicable." See also *Walder* v. *Paramount Publix Corp.* (S. D. N. Y. March 12, 1957) ..... F. Supp. ....., 24 F. Rules Serv. 58.5, Case 1, where the court noted that the provision of local Rule 10(a) relating to resettlement of an order comes into effect only where the judge has called for settlement of an order.

them. Whatever the result might be if local Rule 10(a) did not apply, under that Rule the opinion of the district court in the instant case constituted the judgment.

II.

There was a proper entry of judgment on April 14, 1955 when the Clerk of the District Court docketed the decision granting summary judgment.

If, as we think has been demonstrated, the memorandum decision of the district court constituted the "order" and, accordingly, the judgment in the instant case, then there was a proper entry of judgment when the clerk made his docket entry on April 14, 1955.

Admittedly, the question as to what constitutes a proper entry of judgment is one of first impression for this Court, and the various circuit courts have expressed divergent views on the question, some courts having gone so far as to indicate, without actually being required to decide, that the docket must show the exact amount of the recovery where a money judgment has been rendered. See *United States* v. *Cooke* (9 Cir. 1954), 215 F. 2d 528; see also *United States* v. *Higginson*, *supra*. It is submitted, however, that this view finds no support in Rule 79(a), F. R. C. P., which sets forth the requirements regarding the docket entries, nor is there any valid reason for taking such a restrictive view.

In the instant case, the docket entry stated:

> "April 14 Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file."

This entry told the litigants all that they needed to know about the outcome of the case, and any third person inter-

ested in the outcome could equally inform himself. If the amount of the judgment had been expressly stated in the docket entry, neither the parties themselves nor any third person interested in the outcome could have been any better informed.

Unlike Rule 58, which makes special provision for cases involving the recovery only of money, Rule 79(a) applies to all cases governed by the Federal Rules of Civil Procedure. The same provisions of Rule 79(a) with respect to the content of the docket entries apply to the simplest judgment at law and to the most complicated equitable relief. It would be physically impossible for a clerk to summarize satisfactorily many of the complex judgments which are rendered, and any requirement that he do so would result in the accumulation in the docket of a useless mass of detail.

The question as to how much detail must be inserted in the docket is one which must be decided in each case; for the different types of judgment which may be rendered in litigation are infinite in number. This being so, and in the absence of any specific requirement in Rule 79(a), certainly it is appropriate to leave to the circuit courts an area of discretion as to how much detail the docket entry must contain. Just as it is appropriate in cases of doubt to look to local practice to determine whether there is a judgment, so the question as to whether there has been a proper entry of judgment should be decided in light of such practice. The rule in the Second Circuit that the amount of the judgment need not be stated in the docket entry has long been settled. *United States* v. *Wissahickon Tool Company, supra.* There is no sound reason for changing that rule.

However, regardless of the effect of local rules and decisions, the docket entry in the instant case was fully informative. No one could have been misled. For the benefit of anyone interested in detail, the entry expressly gave directions to the "opinion on file". Such incorporation by reference had exactly the same practical effect as though all of the details of the judgment had been set forth in the docket entry itself. Clearly, the entry set forth the "nature" and "substance" of the judgment and constituted a proper entry of judgment.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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